90-683

No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE GEORGIA MARBLE COMPANY,

*Petitioners,*

v.

WALTER CECIL WHITLOCK AND
COLEEN J. WHITLOCK,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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October 24, 1990

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## QUESTIONS PRESENTED

This petition arises because the Supreme Court of Georgia failed to recognize that a series of decisions by this Court since 1982 require the invalidation of Georgia's mineral interest forfeiture statute. In *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), this Court held that an Indiana mineral interest forfeiture statute did not operate as an unlawful taking of a vested property right nor did it require that notice be given the mineral interest holder prior to forfeiture, due to the fact that a legitimate state interest was involved and the statute was "self-executing" in nature. Subsequent decisions by this Court, in particular *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), have significantly altered the analytical emphasis given by this Court in its review of property forfeiture cases. Because the conflict is in need of resolution, and because the Supreme Court of Georgia relied on *Texaco, Inc. v. Short* without consideration of these subsequent authorities or the very fundamental difference between the Georgia and Indiana statutes, the questions presented for review are:

1. Does the State of Georgia's mineral interest forfeiture act, Ga. Laws 1975, p. 725 § 1, now codified as Official Code of Georgia Annotated § 44-5-168, constitute an unconstitutional taking of property without just compensation, in violation of the Takings and Due Process Clauses of the Fourteenth Amendment to the Constitution?

2. Even if Georgia's mineral interest forfeiture statute does not constitute an uncompensated taking, does its failure to provide notice to a mineral interest owner that his interest is at risk violate the Due Process clause when, as here, the forfeiture statute is not self-executing?

## LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner The Georgia Marble Company and the respondents Walter Cecil Whitlock and Coleen J. Whitlock.

The parent corporation of The Georgia Marble Company is Georgia Marble Holdings Corporation. The Georgia Marble Company has no subsidiaries other than wholly owned subsidiaries.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISION INVOLVED ..... 2

STATUTORY PROVISION INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 8

CONCLUSION ..... 29

APPENDIX (Orders of the Georgia Supreme Court of Georgia affirming the Judgment of the Superior Court of Pickens County and denying rehearing; Judgment of the Superior Court of Pickens County; Resolution of the Pickens County Board of Tax Assessors; O.C.G.A. § 44-5-168; Georgia Tax Return Statutes; Georgia statutes regarding sales under tax levies and executions; Georgia statutes regarding disposition of unclaimed property) ..... 1a

## TABLE OF AUTHORITIES

Page

**Constitution:**

U.S. Const. Amend. V ..... 27

U.S. Const. Amend. XIV, § 1 ..... 2

**Cases:**

*Calhoun v. Jennings*, 512 N.E.2d 178 (S. Ct. Ind. 1987) ..... 19

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492 (1985) ..... 20, 26

*Davis Oil Co. v. Mills*, 873 F.2d 774, 784 (5th Cir. 1989) ..... 16, 27

*Hayes v. Howell*, 251 Ga. 580, 584 (1983) ..... 3

*Hodel v. Irving*, 481 U.S. 704, 716, 731, n.14, 107 S.Ct. 2076, 2083, 2091, n. 14, 95 L.Ed.2d 668 (1987) ..... 22, 23, 24, 25

*Kaiser Aetna v. United States*, 444 U.S. 164, 174-175, 100 S.Ct. 383, 389-390, 62 L.Ed.2d 332 (1979) ..... 24

*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 2076 (1987) ..... 22

*Lambert v. State of California*, 355 U.S. 225, 228, 78 S.Ct. 240, 243 (1957) ..... 15

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32, 102 S.Ct. 1148, 1155-56 (1982) ..... 15, 20, 26

*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27, 102 S.Ct. 3164, 3171 (1982) ..... 22, 23

*McCann v. Scaduto*, 524 N.Y.S.2d 398, 404, 406, 519 N.E.2d 309, 315 (Ct. App. N.Y. 1987) ..... 19, 20

*Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793-94, 798, 800, 103 S.Ct. 2706, 2708-09, 2711-12, 2712, n. 6, 77 L.Ed.2d 180 (1983) ..... 12, 14, 17, 18, 19, 21

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ..... 21

*Nollan v. California Coastal Commission*, 483 U.S. 825, 831, 841-42, 107 S.Ct. 3141, 3150, 97 L.Ed.2d 677 (1987) ..... 22, 24, 26

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125-127, 98 S.Ct. 2646, 2659-2661, 57 L.Ed.2d 631 (1978) ..... 24

*Rockefeller v. First National Bank of Brunswick*, 213 Ga. 493, 100 S.E. 2d 183 (1957) ..... 3

*Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972) ..... 17

*Texaco, Inc. v. Short*, 454 U.S. 516, 519-20, 526, 529, 530, 534, 536, 538, n. 34, 539, 102 S.Ct. 781, 786-87, 790, 792-93, 796-97, 797, n. 34, 70 L.Ed.2d 738 (1982) ..... 8, 10, 11, 13, 16, 22, 27

*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486, 493, 487-88, 108 S.Ct. 1340, 1345-46, 1349, 99 L.Ed.2d 565 (1988) ..... 11, 12, 14, 17

**Miscellaneous:**

**United States Statutes:**

28 U.S.C. § 1257(a) ..... 2

Indian Land Consolidation Act of 1983, Pub.L. 97-459, Tit. II, 96 Stat. 2519, 25 U.S.C. § 2206..... 24, 25

**Georgia Statutes:**

O.C.G.A. § 44-5-168..... 2, 3, 4, 5, 7, 8, 11, 13

O.C.G.A. § 48-4-1..... 15, 18

O.C.G.A. § 48-4-20..... 7

O.C.G.A. § 48-4-21..... 18

O.C.G.A. § 48-4-40..... 18

O.C.G.A. § 48-5-6..... 8

O.C.G.A. § 48-5-15..... 8

**Indiana Statutes:**

Indiana Code § 32-5-11-1 (1976)..... 9

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*Petitioners,*

v.

WALTER CECIL WHITLOCK AND
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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioner The Georgia Marble Company respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Georgia entered in the above-entitled proceeding on July 5, 1989.

## OPINIONS BELOW

The order of the Supreme Court of Georgia affirming the Judgment of the Superior Court of Pickens County has been reported at 260 Ga. 350, 392 S.E.2d 881 (1989), and is reprinted in Appendix B hereto, p. 2a, *infra*. The order of the Supreme Court of Georgia denying rehearing is reprinted in Appendix A hereto, p. 1a, *infra*. The Judgment of the Superior Court of Pickens County has not been reported but is reprinted in Appendix C hereto, p. 10a, *infra*.

## JURISDICTION

The order of the Supreme Court of Georgia as to which petitioner seeks review was entered July 5, 1990. Rehearing was denied by the Supreme Court of Georgia by order dated July 26, 1990. The jurisdiction of this Court to review the order of the Supreme Court of Georgia is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISION INVOLVED

Ga. Laws 1975, p. 725 § 1, now codified as Official Code of Georgia Annotated § 44-5-168, is reprinted in Appendix E, p. 28a, *infra*.

## STATEMENT OF THE CASE

In 1975 the State of Georgia enacted a mineral interest forfeiture statute, now codified as O.C.G.A. § 44-5-168, Appendix E, p. 28a, *infra*. Pursuant to that statute, Georgia authorized the owner of real property in fee simple to obtain the forfeiture of an underlying mineral interest if the owner of the mineral rights had:

> . . . neither worked nor attempted to work the mineral rights nor paid any taxes due on them

> for a period of seven years since the date of the conveyance and *for seven years immediately preceeding the filing of the [declaratory judgment] petition*. (emphasis added.)

The Georgia Marble Company ("Georgia Marble") owns a fractional interest in mineral rights to property located in Land Lot 125 of the 4th District, 2nd Section of Pickens County, Georgia. Georgia Marble acquired this property on April 2, 1924 pursuant to a quitclaim deed conveyance from Mr. Sam Tate. Under Georgia law, minerals in place constitute a part of the real property and thus a conveyance of them creates an ownership in real property. *Rockefeller v. First National Bank of Brunswick*, 213 Ga. 493, 100 S.E. 2d 183 (1957). According to *Hayes v. Howell*, 251 Ga. 580, 584 (1983) "[m]ineral rights are valuable property interests recognized and protected . . . " by the State of Georgia.

On March 29, 1986, Respondents Walter Cecil Whitlock and Coleen J. Whitlock acquired fee simple title to the property, excepting the mineral rights held by Georgia Marble. The tract constitutes approximately 120 acres in the eastern portion of Land Lot 125.

On September 30, 1987, Respondents filed a complaint for declaratory judgment pursuant to O.C.G.A. § 44-5-168 in the Superior Court of Pickens County, naming Petitioner as a defendant. With reference to Georgia Marble's mineral interest, the Whitlocks alleged that Georgia Marble had neither worked nor attempted to work its interest for a period of seven years immediately preceding the filing of their complaint. The Whitlocks also alleged that Georgia Marble had not paid taxes on its mineral interest during the same seven-year period. Based on the foregoing, the Whitlocks sought entry of a judgment declaring that they had obtained title to the mineral interest in question pursuant to O.C.G.A. § 44-5-168.

On November 13, 1987, Georgia Marble filed its Answer to the Whitlocks' Complaint. As a Fourth Defense thereto, Georgia Marble asserted that O.C.G.A. § 44-5-168 violates federal and state constitutional guarantees.[1] Georgia Marble admitted that it had not extracted minerals from the property at any time during the seven-year period preceding the filing of the Whitlocks' Complaint. All other material allegations were denied, including the allegation that taxes had not been paid.

On March 28, 1989, the case was submitted to the Superior Court on a written record. Each party submitted affidavit and documentary evidence in support of its respective claims and defenses.

The only factual question before the Superior Court was whether Georgia Marble had failed to pay any taxes due on its mineral interest during the statutory period. Georgia Marble's evidence specifically addressed the question of whether it had failed to pay any taxes due. Twelve separate affidavits, copies of the Pickens County tax digest for selected years, copies of Georgia Marble's property tax returns for the years 1981-1987, letters accompanying Georgia Marble's tax returns for the years 1983-1987, and a copy of a formal Resolution of the Pickens County Board of Tax Assessors dated January 4, 1988 were placed in the evidentiary record.

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[1] Curiously, Georgia's statute contains an exception to the entire forfeiture scheme for leases of a mineral interest to a licensed mining operator, but permits the forfeiture of a mineral interest actually owned by a licensed mining operator such Petitioner. O.C.G.A. § 44-5-168(f). The statue contains no hint as to why the Georgia General Assembly found it appropriate to exempt mining operators who merely lease mineral rights, but not those who own such rights. Given the statute's aim of encouraging the use of mineral interests, there is no rational basis for such an arbitrary distinction. Indeed, the exception clearly undermines the statute and would appear to violate the Equal Protection Clause.

These documents show how, for a number of years, Pickens County attempted to catalogue all of Georgia Marble's property within the county's jurisdiction. Because the company's property holdings are extensive, and because the manual recordkeeping system used to maintain Pickens County's property records is cumbersome, this proved to be a difficult task. (Appendix D, pp. 25-26a.) Thus, beginning in the 1970's, Pickens County discontinued its practice of listing and separately valuing all property owned by Georgia Marble. Instead, it initiated a "lump sum" valuation system, whereby a single, aggregate bill was submitted to Georgia Marble. *Id.* Additions or deletions to Georgia Marble's holdings were noted on a yearly basis.

In those prior years in which Georgia Marble's property was separately listed and valued, the company paid taxes on its entire interest in Land Lot 125, including the mineral rights at issue. The abstract of the Pickens County tax digest for the year 1966 reflects the payment of taxes on "land, buildings and marble" in Land Lot 125.

After O.C.G.A. § 44-5-168 was enacted in 1975, Georgia Marble acted to insure that its tax payments to Pickens County fulfilled the statute's requirements. Georgia Marble's Division Controller, its Property Tax Manager, and its Property Manager all met with the county's Chief Tax Commissioner. Discussions were had regarding Section 44-5-168 and the fact that Georgia Marble wished to ensure that it made proper payment of taxes due on its interests in the county, including mineral interests which it was unable to value because they remained unexploited. Georgia Marble inquired of the Tax Commissioner whether a return by it of an additional amount for mineral rights — up to $100,000.00 — would be received by the county as payment of all property taxes due. The Tax Commissioner responded that the suggested procedure was acceptable to him. He then referred the

matter to the Pickens County Board of Tax Assessors, which gave formal approval to the procedure.

Thus, in 1982 Georgia Marble began to return an additional valuation (*i.e.*, an amount over and above the county's lump sum bill) of as much as $100,000.00. Georgia Marble introduced into evidence letters from it to the Pickens County Board of Tax Assessors for the years 1982, 1983, 1984, 1985, 1986 and 1987, reflecting therein a return of an additional $75,000.00 to $100,000.00 in property valuation. Each letter specifically notes that the "additional return is being made to cover all mineral rights presently owned by Georgia Marble Company . . . ."

The January 1988 Resolution of the Pickens County Board of Tax Assessors, (Appendix D, p. 25a, *infra.*), specifically finds that Georgia Marble paid all property taxes due through and including the year 1987. *Id.* Moreover, the Board concluded that Georgia Marble had paid all property taxes due with respect to the specific mineral interest at issue in this case. *Id.* These findings were subsequently confirmed by Board members in affidavit evidence submitted to the Superior Court.

Notwithstanding this evidence, the Superior Court of Pickens County concluded that Georgia Marble had not paid taxes on the subject mineral interest. While the Superior Court acknowledged that Georgia Marble "did in fact return *land* in Land Lot Number 125, 4th Dist., 2nd Sect," (Appendix C, p. 13a, *infra.*) (emphasis added), it concluded that Georgia Marble had not specifically designated any payment as covering the mineral interest at issue.

In reaching this conclusion, the Superior Court declared that it would pay no heed to the evidence presented in Georgia Marble's affidavits or the aforementioned Resolution. Likewise, the Superior Court refused to hold that the reference in the county's 1966 tax digest to Georgia Marble having returned payment in Land Lot 125

for "land, buildings & marble," evidenced a return of a mineral interest.[2]

Significantly, as to Georgia Marble's return of the additional valuation, the Superior Court concluded that Georgia Marble had done so "due to its concern that its mineral interest might be lost subsequent to the enactment of O.C.G.A. § 44-5-168." The Superior Court further found that Georgia Marble had explained to the Pickens County taxing authorities that this additional valuation was made in part "because of the universal acknowledged difficulty in valuing unexploited mineral interests." *Id.*, at 15a. In addition, the Superior Court found "that the Tax Commissioner and Tax Assessor's office agreed to this procedure." *Id.* The Superior Court concluded that Georgia Marble "has in fact paid taxes on all property that it returned and also on the lump sum value of mineral interest (sic) not specifically designated." *Id.*

Thus, the Superior Court made the important finding that Georgia Marble had in fact paid taxes. Only because, in the Superior Court's view, Georgia Marble had not properly "returned" its tax payments — that is, had not specifically designated as to which land lots payments

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[2] Georgia Marble asserted that this notation triggered the applicability of O.C.G.A. § 48-4-20, which provides: Any taxpayer of any county who returned or paid taxes in the county for the preceding tax year and who fails to return his property for taxation for the current tax year as required by this chapter shall be deemed to have returned for taxation the same property as was returned or deemed to have been returned in the preceding tax year at the same valuation as the property was finally determined to be subject to taxation in the preceding year.

The Superior Court did not address the applicability of O.C.G.A. § 48-4-20, stating only that, despite the plain designation of "land, buildings & marble" in the 1966 tax digest, "Georgia Marble did not return the mineral interest in Land Lot 125, 4th District, 2nd Section." Appendix C, p. 15a, *infra*.

were made — Georgia Marble was deemed as a matter of law not to have paid taxes on the property at issue in compliance with Georgia's tax collection statutes, O.C.G.A. § 48-5-6 and 48-5-15.

On December 27, 1989, Georgia Marble filed its Enumeration of Errors in the Supreme Court of Georgia. Georgia Marble asserted, *inter alia*, that the Superior Court of Pickens County had erred in not concluding that O.C.G.A. § 44-5-168, by its terms and as construed in Georgia Marble's case, violates the Takings and Due Process Clauses of both the Constitution of the State of Georgia and the Fourteenth Amendment to the United States Constitution.

On July 5, 1990, the Supreme Court of Georgia entered an Order affirming the decision of the Superior Court of Pickens County. On July 16, 1990, Georgia Marble presented a motion for rehearing, which on July 26, 1990 the Supreme Court of Georgia denied.

## REASONS FOR GRANTING THE WRIT

In rejecting Georgia Marble's argument that O.C.G.A. § 44-5-168 is unconstitutional, the Supreme Court of Georgia relied on this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). The majority opinion in *Texaco, Inc. v. Short* advances two basic premises for upholding the forfeiture of the mineral interest at issue there:

1. That so long as a legitimate state interest is served even a penalty so drastic as forfeiture of a vested property interest will be upheld, expressly rejecting a Takings claim; and

2. That notice of a legislative enactment satisfied Due Process requirements because of the self-executing nature of the Indiana Dormant Mineral Interests Act.

Both grounds have been called into question by this Court's subsequent Takings and Due Process decisions. Indeed, decisions by this Court since *Short* make clear that the taking of Petitioner's mineral interest without compensation violated the Fourteenth Amendment.

In addition, those subsequent decisions demonstrate that Georgia's mineral forfeiture statute cannot be upheld because it is not a self-executing statute comparable to a statute of limitations, as was Indiana's statute. As a result, Due Process notice and hearing rights are implicated. This Court should therefore grant review to reverse the Supreme Court of Georgia and to clarify or limit *Short* in light of subsequent decisions which appear to have eclipsed it. The resulting uncertainty and apparent conflict among these decisions makes this case a proper one for Court review.

*This Court's Due Process Decisions Since Short Show That Georgia's Statute is Invalid*

In *Texaco, Inc. v. Short*, this Court upheld the constitutionality of the Indiana Dormant Mineral Interests Act. That Act provides in pertinent part:

> Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof [sic], and the ownership shall revert to the then owner of the interest out of which it was carved. Ind. Code 32-5-11-1 (1976).[3]

The statute became effective on September 2, 1971 and contained a two-year grace period in which owners of

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[3] The Court in *Short* expressly declined to consider whether a period less than 20 years would be constitutionally valid. 454 U.S. at 535, n.28.

mineral interests that were then unused and subject to lapse could preserve them by filing a claim in the recorder's office. Under the statute, notice need not be given to a mineral interest owner prior to a statutory lapse of his interest.

The "use" of a mineral interest that is sufficient under the Indiana statute to preclude extinction includes the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes. 454 U.S. at 519-520, 102 S.Ct. at 786-787.

The Indiana statute provides an exception for owners of ten or more interests in the same county, like Petitioner here. If the owner of ten or more interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving actual notice of the lapse. The purpose of the exception is to encourage single ownership of multiple interests, thereby enhancing prospects for development of the state's mineral resources. *Short*, 454 U.S. at 539, 102 S.Ct. at 797.

While the State of Georgia professes a similar interest in encouraging the production of mineral resources, its statutory mechanism works altogether differently. Instead of a 20-year filing period, a two-year grace period, and a separate 60-day remedial period for inadvertent omissions by multiple interest owners, Georgia provides but a single seven-year time period after which the interest may be lost. The correct statement is *may* be lost, for under Georgia's statutory scheme forfeiture does not arise unless and until the surface rights owner files a declaratory judgment action. Then, the Georgia statute provides that a fee simple owner may gain title to mineral rights if the owner of such rights has neither worked nor attempted to work them, nor paid any taxes due on them, for a period of seven years since the date of the con-

veyance *and for seven years immediately preceding the filing of a declaratory judgment petition seeking title to the mineral rights.* O.C.G.A. § 44-5-168.

Under Indiana's Act the extinguishment of the mineral right is wholly self-executing because the right simply lapses after a given period of non-use. Even so, the appellants in *Short* asserted that they had a constitutional right to be advised that their 20-year period of non-use was about to expire. This Court disagreed, reasoning that because the forfeiture was "self-executing," it was analogous to a statute of limitation, for which an impending expiration required no notice beyond enactment of the statute itself. 454 U.S. at 536, 102 S. Ct. at 796.

The difference then is in the way the statutory mechanism of forfeiture operates. If it is "self-executing," dependent only upon the claimant's failure to act in order for the forfeiture to occur, *Short* holds that notice of the legislative enactment suffices, because no Due Process rights attach. 454 U.S. at 536, 102 S. Ct. at 796.

Significantly, the four dissenting Justices in *Short* would have held that a "form of pre-extinguishment notice, procedurally comparable to the statutorily provided notice with respect to owners of 10 interests or more" is constitutionally required before a property owner can be deprived of his mineral rights. 454 U.S. at 554. Their dissent appears now to be the prevailing position.

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340 (1988), this Court considered the constitutionality of an Oklahoma statute which extinguished the right to assert a debt against a deceased's estate if not done within two months following the publication of notice to creditors. In striking Oklahoma's statute down, this Court expressly limited *Short* to "self-executing" statutes. 485 U.S. at 486, 108 S.Ct. at 1345. Because the Oklahoma statute was not self-executing — it required the involvement of the probate

court before the time bar was ever activated — the Court ruled that creditors were entitled to actual notice of the impending deadline, prior to its expiration. The Court created a bright-line test for evaluating notice requirements:

> Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that Short indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required. *See Mennonite*, 462 U.S. at 793-794, 103 S.Ct. at 2708-2709 (tax sale proceedings trigger 2-year redemption period).

485 U.S. at 487-488, 108 S.Ct. at 1346.

Georgia's statute fails this bright-line test. Like the Oklahoma statute at issue in *Pope*, in Georgia it is the legal proceedings themselves that trigger the time bar. Unlike Indiana's statute, which provides that "a mineral interest shall be extinguished if unused for a period of twenty years . . . ," Georgia's statute is not triggered until forfeiture proceedings are undertaken. The Georgia statute allows a property owner to enjoy all the incidents of ownership until the "legal proceedings themselves trigger the time bar . . . ." *Pope*, 485 U.S. at 487-488. Having been triggered, the statute is then fatal to the mineral owner because there is no opportunity for it either to pay the taxes alleged due or redeem the property. Thus, under Georgia's statute the property owner has lost a fundamental incident of ownership, namely the statutory right to pay taxes and retain his property, once the petition is filed.

It is this fundamental difference between the Georgia statute and the Indiana statute that makes the majority's logic dispensing with notice in *Short* inapposite and Georgia's statute unconstitutional. In Indiana, because the extinguishment of the right occurred automatically, in most cases there would have been no reason for anyone to give notice. The surface rights owner might or might not know that the mineral rights owner had not worked or paid taxes on them, and is literally not required to take any action to acquire title to those rights under Indiana's statute. *Short*, 454 U.S. 538, n. 34, 102 S.Ct. 797, n. 34. In many instances, the automatic loss of mineral rights under Indiana's statute would have occurred years before the current owner of the surface rights acquired them and thus notice of their loss would be impossible. Even if the surface owner decided to file a quiet title action, Indiana's statutory time period would by definition have already expired and notice would be meaningless. Hence, there were severe practical problems with giving notice under the Indiana statute, practical problems which were comparable to those inherent in requiring notice of the expiration of a statute of limitations.

Georgia's statutory procedure stands in sharp contrast, mandating a procedure virtually guaranteed to make the giving of notice easy, yet at the same time not requiring it. Because Georgia's statutory time limit is triggered by the filing of a petition containing the names and addresses of all persons known by the plaintiff to have an interest in the mineral rights, O.C.G.A. § 44-5-168, there is no reason the owner could not be given pre-filing notice. Here, for example, an attorney in a small North Georgia town prepared the petition with full knowledge of Petitioner's ownership interest and knowledge that Petitioner's registered agent resided in the same county in which she did. Nevertheless, Petitioner received no notice of any claim that it was allegedly in default for the payment of taxes until it was too late to do anything about

it. It is difficult to see what state interest is served by allowing the surface rights owner to hide his intentions for seven years and then spring them on unsuspecting mineral rights owners without any notice whatsoever.

*Pope* requires that a property owner receive actual notice, if his identity and address are reasonably ascertainable, at a point in time sufficient to permit him to preserve his property interest. 485 U.S. at 486, 487. To pass constitutional muster, notice must be given prior to any significant impairment of a property right. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712 (1983). Although the Oklahoma statute provided a two-month window within which a creditor could file his claim, there was no actual notice to the creditor of the debtor's death, the filing of the probate petition, or the triggering of the two-month period. Hence, the creditor received no actual notice that any time period was expiring which would significantly affect his ownership interest. It was that failure to give the creditor notice before his interest was impaired that was fatal to Oklahoma's statute. Importantly, in *Pope*, this Court held that until the receipt of actual notice, the time bar could not be triggered and thus could not expire. 485 U.S. at 487, 108 S. Ct. at 1346.

It bears emphasis that the statute struck down in *Pope* at least provided constructive notice, through publication, to creditors and allowed two months after notice for filing claims. No notice, constructive or otherwise, is provided under the Georgia statute prior to the filing of the petition. Because Georgia's seven-year forfeiture period is not static, but instead is fixed by the filing of the forfeiture petition, Georgia Marble literally had all of its rights to the property the moment before the petition was filed, but effectively lost all of its rights the moment the petition was filed. Unlike the Indiana statute, which automatically extinguishes mineral interests after the passage of twenty years, the Georgia act permits a mineral

interest owner to pay any taxes due up to the very instant an action is filed. That right to pay prior to the filing of the petition is meaningless, however, because even property owners like Petitioner, who make every effort to pay their taxes, never receive notice of any claimed default in tax payment. Indeed, here it is beyond question that the local taxing authority could not have sold Georgia Marble's interest at a tax sale, because it was never given notice that any taxes were due, O.C.G.A. § 48-4-1, reprinted in Appendix G, pp. 33-34a, yet Georgia's statute allows a private party to obtain Petitioner's mineral rights without any equivalent notice. As if to add insult to injury, the Supreme Court of Georgia says it can be done in the face of a determination by the local taxing authority that all taxes have been paid.

Although a state may create and limit property rights in various respects, it is fundamental that once a right is created procedural Due Process protections attach to it. As this Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32, 102 S.Ct. 1148, 1155-56 (1982), minimal procedural requirements for a deprivation are a matter of federal, not state law. "Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." 455 U.S. at 432, 102 S.Ct. at 1156.

Here, Georgia statutorily grants a mineral owner the right to pay any taxes allegedly due before a forfeiture petition is filed, but denies that same owner any meaningful notice that would allow him to use that right. In *Lambert v. State of California*, 355 U.S. 225, 228, 78 S.Ct. 240, 243 (1957), this Court observed that:

> Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

Lower courts interpreting *Pope* have read it as limiting *Short*:

> The Supreme Court has recently made clear, however, that the seductively simple reasoning of *Short* may not be broadly applied to erode due process rights.
>
> * * *
>
> Although the time limit on the creditor's claim in *Pope* could probably not be considered a part of the substantive definition of that property interest, *Pope* indicates that the crucial factor in determining whether due process applies to the termination of a property interest is not whether the condition is labeled substantive or procedural, but the means by which the condition is set into motion. Even if a property interest is subject to a "substantive" condition from its inception, the operation of that condition may still constitute a deprivation of property to which due process attaches if the "condition" is not self-executing.

*Davis Oil Co. v. Mills*, 873 F.2d 774, 785 (5th Cir. 1989); *cert. denied* ____ U.S. ____, 110 S.Ct. 331, 107 L.Ed.2d 321 (1989).

Notice is all the more essential because the constitutionality of these types of statutes rests on the concept that "the State has the power to permit unused or abandoned interests in property to revert to another after the passage of time." *Short*, 454 U.S. at 526, 102 S.Ct. at 790. Much of the majority opinion in *Short* rests on that basic premise, to the point that the Court's entire, albeit perfunctory, Takings analysis rests on the concept that no taking occurred because the property could be presumed abandoned. 454 U.S. at 530, 102 S.Ct. at 792-93. Before abandonment may be conclusively presumed, however, it would

seem that some notice to the owner which would allow him to retain his property should be required with respect to any statute such as Georgia's, which is not self-executing. Certainly, the creation of a conclusive, irrebutable presumption has long been recognized to raise serious due process issues. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972). Conclusively presuming abandonment while giving the owner no meaningful opportunity to contest that presumption would appear peculiarly inappropriate.

Interestingly, Chief Justice Rehnquist's dissent in *Pope* relies extensively on the rationale articulated in *Short*. There is, he wrote, "little if any difference" between having the time bar activated by acquisition of the mineral interest, as it was in Indiana, and by notice published by a court-appointed executor, as it was in Oklahoma." 485 U.S., at 493, 108 S.Ct., at 1349. Perhaps justifiably, Chief Justice Rehnquist concluded that the difference in the two cases' outcomes "remains a mystery which is in no way elucidated by the court's opinion." *Id.*

*Pope*'s requirement of notice at a meaningful time is underscored by the decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983). There, the Court struck down a public sale of property made to recover delinquent taxes where the only notice given to the mortgagee was by way of publication. Recognizing the protected property interest of a mortgagee, 462 U.S. at 798, the Court concluded that notice to it by publication prior to a sale did not satisfy the requirements of Due Process. The Court reached this conclusion even though Indiana's statute provided a two-year period in which the property could be redeemed. 462 U.S. at 793, 103 S.Ct. at 2708-09. The *Mennonite* court recognized that a tax sale accompanied by a right of redemption meant that the sale did not necessarily cause the loss of the mortgagee's property. Nevertheless, a significant impairment of a "substantial property interest" did occur, said the Court, because the "tax sale

immediately and drastically diminishe[d] the value . . . " of the mortgagee's security interest. *Id.; see also Davis Oil, supra.*

It bears emphasis that the only post-sale rights the mortgagee had in *Mennonite,* except for the right to redeem, were the same as Petitioner has in this case. Specifically, the mortgagee could defeat the conveyance only by proving "that the property had not been subject to or assessed for the taxes for which it was sold, that the taxes had been paid before the sale, or that the property was properly redeemed before the deed was executed." 462 U.S. at 794, 103 S.Ct. at 2709.[4] All other defenses and rights, including the right to pay the taxes due and avoid the forfeiture altogether, were lost before the mortgagee was given notice. If the post-sale rights the mortgagee had in *Mennonite* were not sufficient to make prior actual notice of the pending sale unnecessary, they are obviously not sufficient to dispense with Due Process notice to an owner of property such as Petitioner. Indeed, the fact that the procedure in *Mennonite* was held unconstitutional even though constructive pre-sale notice was given and a post-sale right of redemption existed only underscores the unconstitutionality of giving Petitioner no notice, constructive or otherwise.

The right to notice at a meaningful point in time is made apparent by the Court's observation in *Mennonite* that even if the mortgagee knew that taxes on the property were delinquent, such knowledge is not equivalent "to notice that a tax sale is pending." 462 U.S. at 800, 103 S.

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[4] Georgia's mineral interest forfeiture statute affords no such right of redemption to Petitioner. That is all the more curious because under Georgia law, had a local government conducted a sale of Petitioner's property for delinquent taxes, Petitioner would have been entitled to notice of the alleged failure and enjoyed a right of redemption for one year. O.C.G.A. §§ 48-4-1, 48-4-21, 48-4-40, reprinted in Appendix G, pp. 32a, 36a, 39a, *infra.*

Ct. at 2712. Instead, the Constitution requires actual notice, where reasonably practicable, of the pendency of the tax sale. 462 U.S. at 798, 103 S.Ct. at 2711. Moreover, by drawing the Due Process line at a point prior to the tax sale, rather than merely prior to the expiration of the redemption period, *Mennonite* makes it clear that notice, to be meaningful, must come prior to any significant impairment of the property owner's rights. *Id.*[5]

Lower courts interpreting this decision have specifically found that "notice which does not afford a realistic opportunity . . . to avoid forfeiture of the title . . . does not afford due process." *McCann v. Scaduto*, 524 N.Y.S.2d 398, 404, 519 N.E. 2d 309, 315 (N.Y. Ct. App. 1987); *see also, Davis Oil, supra.* *McCann's* interpretation of *Mennonite* is significant because, as the dissent in *McCann* points out, in New York "all incidents of ownership remain with the taxpayer until the redemption period expires and . . . a purchaser at a tax sale acquires no more than a lien for the delinquent taxes, penalties and interest." 524 N.Y.S.2d at 406. Nevertheless, the New York Court of Appeals held that Due Process requirements were triggered by the tax sale itself, even though it did not divest the owner of its property in any way. Hence, notice prior to the sale was required.

By contrast, the Indiana Supreme Court has held, in continuing reliance on *Short*, that no notice of the expiration of a redemption period is required, a proposition which seems highly questionable in light of *Mennonite* and *Pope. See, Calhoun v. Jennings*, 512 N.E.2d 178 (Ind. 1987). That decision conflicts with the decision in *McCann*, which holds that not only is notice required

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[5] Significantly, *Mennonite* did not address the viability of notice during the redemption period, because it found "that the failure to give adequate notice of the tax sale proceeding deprived appellant of due process of law . . . ." 462 U.S. 799, 800, 103 S.Ct. at 2712, n. 6.

prior to the expiration of the redemption period, but also that notice given 90 days prior to the expiration of a two-year redemption period is insufficient. Instead, the Court in *McCann* found that if the legislature established a two-year redemption period, notice given only 90 days before the expiration of that period was not sufficient. *Id.* at 404.

Thus, it is the opportunity to pay taxes allegedly due prior to the time a forfeiture occurs that Due Process considerations are meant to protect. In this case, Georgia's statutory scheme gives a mineral owner the right to avoid a forfeiture by paying taxes prior to the filing of a petition, but then fails to accord that right any Due Process protection in the form of meaningful notice. If Due Process considerations serve to protect mortgagees who have "knowledge of delinquency in the payment of taxes," 462 U.S. at 800, then certainly Due Process should serve to protect an unwitting property owner which has discussed the payment of taxes with its local taxing officials and taken every possible step to ensure that its taxes are paid. State laws which give citizens the right to notice of a forfeiture for non-payment of taxes only after the forfeiture has occurred render Due Process protections meaningless. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 431-32, 102 S.Ct. at 1155-56; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492 (1985). Indeed, to meet Due Process concerns, the Superior Court of Pickens County, upon concluding that Georgia Marble had failed to pay taxes, should have provided Georgia Marble an opportunity at that time to remit payment in such a way as to avoid the forfeiture.

Justice Brennan's observation in *Short* that it is difficult to conceive what state interest is served by not requiring notice presages the majority's observation in *Mennonite* that notice to the mortgagee may actually result in a lessened administrative burden on the local government. The mortgagee will simply pay the

delinquent taxes, thereby avoiding altogether the need for a tax sale. *Id.*, n. 5.

Here, whatever legitimate state interest exists can easily be served by requiring notice to the mineral interest holder and giving him an opportunity to pay the taxes due, which is precisely what the four dissenting Justices in *Short* would have required, precisely what the Indiana statute required for persons like Petitioner who hold ten or more mineral interests in a county, and precisely what would have been required for a tax foreclosure. The Georgia statute produces the absurd result that the surface owner is required to name the mineral rights owner as a defendant but is not required to give him notice before the key event triggering the forfeiture, namely the filing of the statutorily required petition for declaratory judgment.

There are no practical problems, administrative burdens, or other problems associated with the giving of notice by a person seeking to obtain ownership of another person's property under Georgia's statute. Certainly, such notice would advance the legitimate state objective of extinguishing claims which are abandoned or stale, while simultaneously protecting those which are neither. Indeed, such an approach would also result in cheaper, more expeditious resolutions of such claims than does the Georgia declaratory judgment procedure. Applying the rationale of *Mennonite* and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950), notice here would certainly have been easily accomplished and it is difficult to conceive any state interest that would be furthered by not giving notice. The simple fact is that Georgia's statute cannot be upheld under *Pope* if, as the majority opinion holds, *Short* is limited to forfeiture statutes of a self-executing nature, comparable to statutes of limitations. 485 U.S. at 486, 108 S.Ct. at 1345. *Pope* cannot be reconciled with *Short*, unless, as *Pope* holds, the self-executing feature of the Indiana statute is

all-controlling and any forfeiture statute which is not similarly self-executing must yield to due process limitations. In that event, Georgia's statute is unconstitutional and the decision of the Supreme Court of Georgia must be reversed.

*The Progression of Takings Jurisprudence Has Undermined Texaco v. Short.*

The second major underpinning to *Short* was the legitimate state interest that Indiana's statute purportedly sought to advance, most notably encouraging the owners of mineral interests to develop their property. 454 U.S. at 529, 102 S. Ct. at 792. The principal difficulty with this legitimate purpose rationale of *Short* is that the Court focused too much on the state interest in forfeiting the property and too little on the uncompensated taking of property. This Court's recent Takings decisions make it clear that a complete taking of property without compensation can almost never be justified, regardless of the governmental purpose. *See, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 2076 (1987); *Nollan v. California Coastal Comm.*, 483 U.S. 825, 107 S. Ct. 1341 (1987); and *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987).

In *Loretto* this Court struck down, as an uncompensated taking, a New York statute that allowed a physical intrusion by cable television companies on building rooftops. By extension, the Court doomed Georgia's mineral forfeiture statute as well:

> We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.

> . . . [W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative.
>
> When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.

458 U.S. at 426-27, 102 S.Ct. at 3171.

Georgia's statute authorizes much more than the modest physical intrusion at issue in *Loretto*. Instead, it authorizes a complete and permanent deprivation of Petitioner's property. If, as *Loretto* holds, "any permanent physical occupation is a taking," there can be no doubt that permanent deprivation of property is a taking. Indeed, whenever the governmental act results in the loss of some basic stick in the bundle of rights commonly characterized as property, such as was the case in both *Loretto* and *Nollan*, a taking of property has been found. *Hodel v. Irving*, 481 U.S. 704, 716, 107 S.Ct. 2076, 2083 (1987). These cases illustrate that constitutional Due Process and Takings jurisprudence have evolved substantially since *Texaco v. Short* was decided, to the point that when the drastic act of permanent deprivation is at issue, the legitimacy of the government's purpose is no longer paramount.[6] Instead, as *Loretto* holds, the permanent

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[6] The difference between *Short* and the Court's more recent Takings cases is well illustrated by the fact that in *Keystone* a regulation which deprived coal companies of less than 2% of their mineable reserves was sufficient to generate a lengthy majority opinion and a strong

physical deprivation of the property is determinative. As Justice Scalia wrote for the majority in *Nollan*, a state is indeed free to advance its legitimate public purposes, but if it seeks to do so by taking private property it must pay for it. 483 U.S. at 841-42, 107 S. Ct. at 3150.

The evolution of this Court's Takings jurisprudence, and the consequent obsolescence of decisions such as *Short*, is best exemplified by *Hodel v. Irving*, 481 U.S. 704, 107 S. Ct. 2076 (1987). In *Irving*, the Court reviewed a Congressional Act intended to remedy the fractionation of Indian lands, a problem which the Court's opinion acknowledges had become acute. Thus, a clearly legitimate Congressional purpose underlay the statute.

In the course of analyzing the Act, this Court first examined three of the four Takings factors outlined in numerous cases, such as *Keystone, supra, Kaiser Aetna v. United States*, 444 U.S. 164, 174-175, 100 S.Ct. 383, 389-390, 62 L.Ed.2d 332 (1979), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125-127, 98 S.Ct. 2646, 2659-2661, 57 L.Ed.2d 631 (1978). Application of the first three factors (underlying governmental purpose, economic impact, and absence of investment-backed expectations) gave the Court little pause, instead suggesting to it that the Indian Land Consolidation Act was constitutional. 481 U.S. at 716, 107 S.Ct. at 2083.

But application of the fourth factor, the character of the government regulation, was fatal to the Act's constitutionality. Because the Act took away the right to transfer

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dissent by four Justices. Likewise, although the taking in *Loretto* was *de minimus*, it was sufficient to generate a landmark takings decision. These cases, all decided after *Short*, make it extremely difficult to understand *Short's* perfunctory dismissal of a complete deprivation of property.

property at death, it "destroyed 'one of the most essential sticks in the bundle of rights that are commonly characterized as property . . .'" and was thus unconstitutional. 481 U.S. at 716, 107 S.Ct. at 2083. That loss of the right to transfer property at death was described by the majority as an "extraordinary" right, which "has been part of the Anglo-American legal system since feudal times." *Id.* The extraordinary character of the governmental regulation meant that even the undisputed, overwhelming governmental purpose could not justify the taking. Instead, just as in *Nollan*, the Court held that the laudable governmental purpose could not overcome the fact that the action at issue constituted a naked taking of private property without compensation.

Had the logic of *Short* prevailed in *Irving*, the decision would have hinged almost exclusively on the legitimate governmental purpose underlying the Act and but scant attention would have been given to the extraordinary remedy which it mandated. But the Court's more recent focus on the extraordinary character of the governmental action — the forfeiture of property at death — caused the Court to find the Indian Land Consolidation Act unconstitutional. This point is made explicit by the Court's own recognition that if its review were to have stopped short of analyzing the "extraordinary" character of the governmental regulation at issue, it would in all likelihood have upheld the statute. 481 U.S. at 716, 107 S. Ct. at 2083.

Thus, it is *Short's* failure adequately to address the extraordinary nature of the forfeiture remedy that makes it so inconsistent with the Court's more recent Due Process and Takings pronouncements. This inconsistency is underscored by the concurring opinion of Justice Stevens in *Irving*. In contrast to the majority opinion, Justice Stevens, joined by Justice White, rejected the majority's takings analysis and offered a rationale more reminiscent of *Short*. That analysis was grounded in *Short's*

government-regulation-of-the-creation-and-retention-of-property-rights approach, an approach implicitly rejected by the *Irving* majority's Takings analysis and its emphasis on the "extraordinary" character of the regulation at issue. Justice Stevens' analysis is akin to the argument that government may create a right and attach substantive conditions to it such that the right is unaccompanied by Due Process protections. *Nollan*, however, expressly rejects the notion that the prohibition of the Takings Clause can be evaded by the simple expedient of labeling a taking as a mere "restriction" on the use of property. As the majority there observed, to call a permanent taking simply a "restriction" uses "words in a manner that deprives them of all their ordinary meaning."[7] *Nollan*, 483 U.S. at 831.

Lower court decisions subsequent to *Irving* and *Nollan* have also declined to grant broad license to the type of "substantive condition" exception to Due Process which appears to be implied by the majority's reasoning in *Short* and Justice Stevens' concurring opinion in *Irving*:

> The simple act of labelling a condition 'substantive' does not eliminate Due Process concerns. At some point, to hold that no Due Process attaches to the operation of a 'substantive' condition that terminates a property right is to define the scope of that

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[7] Likewise, in *Cleveland Board of Education, supra*, the Court expressly held that "the legislature may elect not to confer a property interest . . ., [but] it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." 470 U.S. at 541, 105 S.Ct. at 1492. Other decisions of this Court have recognized that even though a particular entitlement arises by virtue of state statutory or common law, Due Process mandates the procedure to be followed in depriving an individual of those state created rights. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32, 102 S. Ct. 1148, 1155-56 (1982).

> property right by the absence of procedural protections attendant upon its termination. This too reduces the Due Process Clause to a tautology.

*Davis Oil Co. v. Mills*, 873 F.2d 774, 784 (5th Cir. 1989).

Justice Stevens' reluctance to join the majority in *Irving* stemmed from his preference for the *Short* type of analysis and a belief that *Irving* invites "widespread challenges under the Fifth Amendment takings clause to a variety of statutes of the kind that we upheld in *Texaco v. Short*." 481 U.S. at 731, n. 14, 107 S. Ct. at 2091, n. 14.

His observations have proven prescient. *Irving* cannot be reconciled with *Short*, not when it is recognized that the Court in *Irving* was striking down an Act of Congress with an unquestionably legitimate purpose. *Irving* simply underscores, as do *Loretto*, *Keystone* and *Nollan*, that the Court's emphasis in *Short* on the legitimacy of the public purpose, without apparent regard for the "extraordinary" nature of the remedy mandated by the statute, as well as the lack of any compensation whatsoever to the affected property owner, was misplaced.

Here, The Georgia Marble Company has lost, to a private party, a mineral interest which it has held since 1924. Its loss has been effected without prior notice and without just compensation. Moreover, its interest has not merely been regulated or limited in some way, as in *Keystone*, or only an easement taken, as in *Nollan*, or only the right to transfer property at death taken, as in *Irving*. Quite simply, Petitioner's entire interest has been taken and given to another private party. Georgia Marble took every conceivable precaution to preserve its interest, even to the point of obtaining confirmation from the local taxing authorities that it had paid all taxes due on it. The State of Georgia has nevertheless seen fit to strip that interest away with less procedural and substantive

protection than would be due Petitioner for a public tax sale of its property. If Congress may not require Indians to consolidate their property holdings or risk escheat to the Tribe, if the State of New York may not require a building owner to provide space for a one-half inch diameter wire, and if California may not require an easement to the beach, certainly the State of Georgia may not forfeit Georgia Marble's property for the benefit of a private party. The decision of the Supreme Court of Georgia must be reversed and Georgia's mineral forfeiture statute must be struck down.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

**SUPREME COURT OF GEORGIA**

ATLANTA JULY 26, 1990

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A0316

GEORGIA MARBLE COMPANY V. WALTER CECIL WHITLOCK ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix B

IN THE SUPREME COURT OF GEORGIA

Decided: July 5, 1990

S90A0316. GEORGIA MARBLE COMPANY v. WHITLOCK et al.

BELL, Justice.

This appeal concerns, inter alia, the constitutionality of Georgia's statute for the lapse of mineral interests or rights,[1] OCGA § 44-5-168, and whether defendant-appellant Georgia Marble has failed to pay taxes due on the mineral interest that is the subject of this litigation and thus has lost that mineral interest under § 44-5-168. The trial court held the statute constitutional and ruled that Georgia Marble had lost its mineral interest. We affirm.

Plaintiffs-appellees, Cecil and Coleen Whitlock, are the fee owners of approximately 120 acres in the eastern portion of Land Lot 125 of the 4th District, 2nd Section, Pickens County. Georgia Marble obtained its mineral interest on the Whitlock's property in 1924.

Relying on § 44-5-168, the Whitlocks filed this action on September 30, 1987, to gain title by adverse possession to Georgia Marble's mineral interest in the Whitlocks' property. That statute provides, in relevant part, that when mineral rights have been conveyed, the owner of the real property in fee simple may gain title to such mineral rights by adverse possession if the owner of the mineral rights has neither worked nor attempted to work the mineral rights, nor paid any taxes due on them for the seven years immediately preceding the filing of a petition

[1] We use the terms mineral interests and mineral rights interchangeably in this opinion.

to gain title by adverse possession. As this Court has previously noted,

> it might be more accurate to say that under this statute the owner of the mineral rights loses them by nonuse plus nonpayment of taxes, as opposed to losing such rights by adverse possession of the fee simple owner. [*Hinson v. Loper*, 251 Ga. 239, 240 (304 SE2d 722) (1983).]

Georgia Marble admitted that it had not worked or attempted to work the mineral rights, but alleged it had paid taxes on the mineral rights.

The parties submitted the case to the trial court for decision on a written record. The issues before the trial court included whether lump-sum tax payments Georgia Marble had made on unspecified property constituted the payment of taxes on the Whitlock mineral interest within the meaning of § 44-5-168, and, if not, whether any tax documents indicated that the Whitlock mineral interest had been specifically returned or that the interest specifically had been considered, valued, and assessed. Georgia Marble also attacked § 44-5-168 as unconstitutional.

The evidence included returns by Georgia Marble, tax digests, property cards, maps, and lists of property. Some of these documents dated from the 1960s. The evidence showed that in the early 1970s Pickens County changed its billing procedures for property taxes. Before the change in procedure, Pickens County would individually list on its digests all taxpayers' properties and the tax due thereon. After the change, Pickens County would not individually list all properties but would merely show on the tax digest a lump-sum valuation and the amount of taxes due. Also submitted for the court's consideration was a 1982 agreement between Georgia Marble and Pickens County tax officials, the purpose of the agreement being to permit Georgia Marble to avoid the loss of unmined mineral in-

terests under § 44-5-168, by filing a general annual return for all mineral rights owned by Georgia Marble without specifying those rights in any way and by paying an annual lump sum as the taxes for the unspecified rights.

As the tax digests for the relevant tax years only indicated a lump-sum valuation of property and the amount of tax due thereon, the court found it necessary to look to evidence extrinsic to the digests to determine whether Georgia Marble had paid the taxes due on the mineral interest at issue in this case. The trial court held that § 44-5-168 would be satisfied either if Georgia Marble had returned the mineral interest or if tax officials had considered and valued it. The court reasoned that in either of those events, it would be reasonable to infer that Pickens County tax officials included the tax due on the interest in the lump-sum reflected on the tax digests.[2] After examining evidence exclusive of the 1982 agreement, the court found that Georgia Marble had never returned its mineral interest in the Whitlocks' property, and that Pickens County tax officials had never considered and valued the mineral interest. Moreover, regarding the 198[illegible] agreement, the court found that Georgia Marble had [illegible]luty to return all of its mineral interests under OCGA §§ 48-5-10

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[2] We agree with the court that § 44-5-168 would be satisfied by the return of the mineral interest and a lump-sum payment of tax on unspecified property. However, we note that this principle might be subject to an exception (not presented by the facts of this case) if other evidence showed that tax officials, through inadvertence or otherwise, had not included the tax due on the mineral interest within the lump-sum tax on the tax digest.

Moreover, we assume, for purposes of this opinion, that the court correctly interpreted § 44-5-168 by ruling that actual consideration and taxation by local tax officials (plus a lump-sum payment) would be sufficient compliance, even absent a return. However, we note that we make this assumption because the correctness of the interpretation was not cross-appealed and because Georgia Marble did not meet the requirement.

and 48-5-15; that Pickens County tax officials had no authority to accept the return of property except as provided by law, § 48-5-15 (c); and that Georgia Marble could not rely on the tax officials' decision to permit it to return and pay taxes in any manner other than that provided by law. The court concluded that Georgia Marble did not pay taxes on its mineral interest in the Whitlocks' property for the tax years in question, and that under § 44-5-168 Georgia Marble had lost its mineral interest. The trial court also concluded that § 44-5-168 was constitutional.

1. In its first enumeration of error Georgia Marble argues that the trial court erred in concluding that Georgia Marble had lost its mineral interest.

a. Georgia Marble argues that the trial court erred in concluding that it did not specifically return its mineral interest in the Whitlock property for the tax years in question. Georgia Marble contends that it did specifically return the interest and that therefore the lump-sum payments on the tax digests included the payment of taxes on its mineral interest in the Whitlock property. However, our review of the record shows the trial court correctly concluded that Georgia Marble did not specifically return the interest from 1980 to 1987.

b. Georgia Marble also argues that, even if it did not specifically return its interest for the tax years 1980 to 1987, it did specifically return that interest in prior years. According to Georgia Marble, it was therefore deemed under OCGA § 48-5-20 (a) to have returned that mineral interest on the ground the interest had been returned before 1980. However, the evidence shows that Georgia Marble did not return its interest in the Whitlock property before 1980. Accordingly, § 48-5-20 (a) has no application to this case.

c. Georgia Marble contends that the tax digests were sufficient by themselves to show it had paid taxes on the

Whitlock property, and that the trial court therefore erred in reviewing documents extrinsic to the tax digests to determine that question. We find the court did not err. The tax digests do not reveal in any fashion the properties for which the lump-sum taxes were being paid. Accordingly, to determine whether the lump-sum payments on the tax digests from 1980 to 1987 included payments on the mineral interest in the Whitlock property, the trial court was forced to review other evidence (such as tax returns, property cards, and maps and lists of property in the tax assessor's office) to determine whether the mineral interest in the Whitlock property was considered and valued for tax purposes.

d. Georgia Marble also contends that, even if no other evidence shows that the mineral interest in the Whitlock property was specifically considered for tax purposes from 1980 to 1987, under its 1982 agreement with Pickens County Georgia Marble should be deemed to have paid the taxes due on the Whitlock mineral interest within the meaning of § 44-5-168. In this regard Georgia Marble argues that § 44-5-168 is a departure from the common law and therefore should be strictly construed. Georgia Marble moreover argues that § 44-5-168 should be construed to avoid a forfeiture if possible.

For the reasons we will give below, we conclude as a matter of law that the agreement between Georgia Marble and Pickens County tax officials cannot constitute the payment of taxes due, within the meaning of § 44-5-168, on Georgia Marble's mineral interest in the Whitlock property.

Beginning with its 1982 return Georgia Marble did not attach a separate list of mineral interests to its tax returns or list its interests on the returns (both of which it had done in previous years), but did attach letters to the returns, stating that "an additional return is being made

to cover all mineral rights presently owned by the Georgia Marble Company." From 1982 to 1987 Georgia Marble returned these unspecified mineral interests as having values ranging from $75,000 to $110,000. These letters and returns of unspecified mineral interests reflect an agreement between Georgia Marble and Pickens County tax officials that Georgia Marble would pay taxes on the lump-sum valuation to protect all of Georgia Marble's mineral interest from loss under § 44-5-168.

Georgia Marble has cited two rules of statutory construction, but we find two other rules controlling — that statutes should be construed in pari materia with other statutes and that courts should strive to give effect to the purpose of a statute. As one of the purposes of § 44-5-168 is to encourage the collection of taxes, *Hayes v. Howell*, 251 Ga. 580, 585 (2 b) (308 SE2d 170) (1983), § 44-5-168 must be considered in pari materia with Georgia's tax statutes, to determine what constitutes the payment of taxes due under § 44-5-168.

To accomplish the proper collection of taxes, the General Assembly has established a taxing scheme calling for all property to be returned with specificity. § 48-5-10; § 48-5-15. The General Assembly has also provided that local tax officials must only accept the return of property as provided by law. § 48-5-15 (c). The reason for these rules is obvious: if local tax officials do not know of certain property, they cannot undertake to see that it is properly and fairly taxed. See generally, *Dubbers-Albrecht v. Nathan*, 257 Ga. 111, 112 (2) (356 SE2d 205) (1987), in which we recognized the importance of the taxing scheme within the context of § 44-5-168.

The agreement between Georgia Marble and Pickens County was in violation of the taxing laws, and defeats one of the purposes of § 44-5-168 — the collection of taxes on mineral interests. Therefore, we find as a matter of law that the agreement is not sufficient to constitute the re-

turn of the Whitlock mineral interest, and that the taxes paid on the lump-sum valuation under the agreement cannot be deemed to constitute the payment of taxes due on that interest.[3]

e. To summarize, as the record supports the trial court's findings that Georgia Marble failed to return the property, and that local tax officials did not consider and value the property and assess taxes on it to Georgia Marble, we conclude that the trial court correctly found that Georgia Marble did not pay the taxes due on its interest in the Whitlock property. Accordingly, the trial court properly concluded that Georgia Marble had lost its mineral interest under § 44-5-168.

2. Georgia Marble next argues that § 44-5-168 is unconstitutional in that it effects an uncompensated taking of Georgia Marble's property. We disagree.

OCGA § 44-5-168 gives the owners of severed mineral interests three ways to protect their property: they may work the rights; they may attempt to work the rights; they may pay taxes on the rights. Only if the owner fails to comply with the state's requirements for seven years will the owner's mineral interests lapse and return to the owner of the fee. There is no question that "the state has the power to condition the permanent retention of [these] property right[s] on the performance of reasonable conditions that indicate a present intention to retain the interest," *Texaco, Inc. v. Short*, 454 U.S. 516, 526 (102 SC 781, 70

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[3] Not presented by the facts of this case is the issue whether tax payments made pursuant to such agreements can constitute the payment of taxes due on property that previously had been returned specifically (and thus are deemed to be returned year after year under § 48-5-20 (a)) or on property that a taxpayer notified the taxing authorities of when such an agreement was entered. See Division 1 (a) and (b), supra.

LE2d 738) (1982). Such conditions are a "reasonable exercise of the police power" of the state. *Hayes v. Howell*, supra, 251 Ga. at 585 (2b) (1983). Accord, *Texaco, Inc. v. Short*, supra, 454 U.S. at 529-530.

Since, under the exercise of its police powers, the state may treat as abandoned a mineral interest that has been neither used nor returned for taxes for seven years, *Hayes v. Howell*, supra, 251 Ga. at 584-585; *Texaco, Inc. v. Short*, supra, 454 U.S. at 530, "it follows that, after abandonment, the former owner retains no interest for which he may claim compensation," *Texaco, Inc. v. Short*, supra, 454 U.S. at 530. Moreover, § 44-5-168 "does not divest the mineral owner of his rights; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit." *Hayes v. Howell*, supra, 251 Ga. at 585. Thus, under the statute, the state has not taken Georgia Marble's property; Georgia Marble has simply failed to make any use of the property or pay taxes on it, and has let its rights in the property lapse. *Texaco, Inc. v. Short*, supra, 454 U.S. at 530.

Accordingly, we find that § 44-5-168 does not work a taking of property without just compensation.

3. We find no merit in Georgia Marble's remaining contentions.

*Judgment affirmed. All the Justices concur.*

Appendix C

**IN THE SUPERIOR COURT OF PICKENS COUNTY**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| WALTER CECIL WHITLOCK and COLEEN J. WHITLOCK | ) | |
| Plaintiffs | ) | CIVIL ACTION NO. 87CV-000288 |
| vs. | ) | JUDGMENT OF THE COURT |
| THE GEORGIA MARBLE COMPANY | ) | |
| Defendants | ) | |

**ORDER**

Plaintiffs Cecil and Colleen Whitlock filed their Complaint to quiet title in approximately 120 acres in the eastern portion of Land Lot 125 of the 4th District, 2nd Section, Pickens County, Georgia, pursuant to the terms of O.C.G.A. §44-5-168, Georgia's mineral interest lapse statute. Plaintiffs allege that they are the fee title owners of the property in question and were granted a general warranty deed for the property; and that for at least seven (7) years prior to the filing of the Complaint, Defendant has neither worked nor attempted to work any minerals from the property, and that, for the seven (7) years prior to the filing of the Complaint, Defendant has not paid tax due on any mineral interest appurtenant to Plaintiffs' property.

Defendant Georgia Marble answered the Complaint alleging that it had paid ad valorem taxes on the minerals appurtenant to Plaintiffs' property.

Plaintiffs filed a Motion for Summary Judgment and Defendant responded. The Court denied the Motion for Summary Judgment finding that, from the evidence submitted, there was a question of fact as to whether or

not the subject property (mineral rights of Defendant in Land Lot No. 125, 4th Dist. 2nd Sect. of Pickens County, Georgia,) had been in fact returned for taxes and taxes paid for a period of seven (7) years immediately preceding the filing of the Plaintiff's Petition for Declaratory Judgment.

At the pre-trial conference, it was agreed that since the question for determination would be limited to whether the Defendants had returned and paid ad valorem taxes on its mineral interest in the Whitlock property in the past seven (7) years, the parties would simply submit their evidence to the Court for determination of that question rather than to have a jury decide the same inasmuch as the question to be determined would be based on the actual records of the tax office (Tax Commissioner and Tax Assessors offices).

The Defendant has previously filed a Motion in Limine requesting that the Court not consider the affidavit of Elizabeth R. Glazebrook dated March 23, 1989 and also a Motion in Limine moving the Court to strike from Plaintiff's evidentiary filing two documents appearing in Plaintiff's Exhibit 6 (Miscellaneous Documents from Tax Assessors Office) entitled "Georgia Marble Company survey number 1981-1982" and Georgia Marble Company Land "Holdings".

The Court denies each of said Motions in Limine inasmuch as portions of the affidavit of Elizabeth R. Glazebrook and also the documents appearing in Plaintiff's Exhibit No. 6 have relevance to this case.

Plaintiff has also filed a Motion in Limine to exclude from the evidence in this case:

1. That certain resolution of the Pickens County Board of Tax Assessors dated January 4, 1988; and

2. All the tax digests and records for years created prior to September 1980.

The Court denies Plaintiff's Motion in Limine as to each of these documents to the extent that the Court must review each and every one of the documents in order to determine if there is any indication as to whether or not taxes were paid on the mineral interest in the property claimed by Plaintiffs for seven (7) years immediately prior to the filing of the Complaint (filed on September 30, 1987).

The Court will not consider conclusionary opinions by any of the affiants or in the resolution of the Board of Tax Assessors as to the ultimate issue of whether or not taxes were paid. The Court will look to all the evidence in the records of the Tax Commissioner and Tax Assessor's office in determining whether or not there were returns made and *taxes paid* for the seven (7) years immediately preceding the filing of the petition by Plaintiffs (1980, 1981, 1982, 1983, 1984, 1985, and 1986).

The parties having submitted evidence to the Court in lieu of trial by jury, the Court makes the following finding of facts and conclusions of law.

## FINDING OF FACTS

Plaintiff and Defendant agreed upon a stipulation of certain facts which was filed with the Court on March 29, 1989. The stipulation of facts is adopted by the Court in its "Finding of Fact" and said stipulations are made a part of these Finding of Facts by reference thereto.

The Court further finds facts as follows:

Walter C. Whitlock and Coleen J. Whitlock are the owners in fee simple of the tract of land in the east portion of Land Lot No. 125 in the 4th Dist. and 2nd Section of Pickens County, Georgia, being approximately 120 acres (Exhibit A, Plaintiff's Verified Complaint).

Defendant Georgia Marble owns approximately 45 acres more or less of land in Land Lot No. 125, 4th Dist. 2nd Section with mineral rights excepted (Cowarts). The

actual amount of this fee simple title varies from 45 acres more or less to as little as 30 acres (Defendant's Exhibit B) and is also shown on tax records at one point as 41.+- acres, (Tax Assessors Office Records). A fractional interest in the mineral rights in the property now owned by Plaintiffs was conveyed to Georgia Marble by Quit Claim Deed dated April 2, 1924 from Sam Tate (Defendant's Exhibit No. W).

That during the seven (7) years prior to the institution of this litigation, (1980-1986), Georgia Marble neither worked nor attempted to work the mineral interest. That Georgia Marble did not file a return which specifically listed its mineral interest in Land Lot No. 125, 4th Dist. 2nd Section, (which is the property owned by Whitlocks), and that there is not any records in the Tax Commissioner's Office or Tax Assessors' Office which shows that said mineral interest was returned for tax purposes nor actually valued and considered by the Tax Assessors Office for tax purposes.

That Georgia Marble did in fact return land in Land Lot No. 125, 4th Dist. 2nd Sect. and that said returns in the early 1960-1965 showed Land Lot 125, 4th District 2nd Section as being 160 acres, that in 1967 the land in 125, 4th Dist. 2nd Section was returned as part of 5,122 acres of land, and that in 1966 it was returned as a part of 751 acres (land, buildings, marble) and that since 1968, Land Lot No. 165, 4th District 2nd Section has continued to be returned annually as a part of 751 acres (Land Lots 105, 106, 123, 124, 125, 85, 86, 107 and 88).

That for most years, Georgia Marble would file tax returns and show additions and deletions from prior returns and would also have attached *a list of all property to which it owned fee simple title and would also attach a separate list of mineral interests only* (Plaintiff's Exhibit 3 and Defendant's Exhibit P).

That since the early 1970's, Pickens County Tax statements show only a lump sum of values and amount of taxes due (all valuations lumped together and all taxes

lumped together) from land owners rather than listing of the value and the tax on each parcel or interest separately; and that, since the Tax Digest of Pickens County only shows lump sum valuation and taxes from landlords such as Georgia Marble, the only guide to inquiry as to whether the particular mineral interest in Land Lot No. 125 was returned for tax purpose and taxes paid on them is through the records in the Tax Assessors Office including the returns of the taxpayer. That the records of the Tax Assessors Office contain miscellaneous documents cataloguing Georgia Marble's mineral interest including the work records of Terry Cantrell who compiled various records in his capacity as an Assessor (and later Chief Assessor), and also tax payer returns for most of the years in question as well as prior years filed by the Defendant with the Tax Assessors Office. The Court further finds that nowhere in the tax records, including taxpayers annual returns, is there any direct indication that Georgia Marble owned a fractional interest in the mineral interest in the east portion of Land Lot No. 125 owned by Plaintiffs at the present time.

The Court further finds that Georgia Marble has provided maps including the map designated "Map 25 Tate Division, Pickens County", to the Tax Assessors Office which purports to outline Georgia Marble's various interests in and around Land Lot No. 125; that the maps were acknowledged as not being "completely accurate" when originally made by the engineering firm for Georgia Marble Company; that this map only notes the interest of Georgia Marble in the fee of the west half of Land Lot No. 125 (which Cowart mineral interest are excepted); and that there is no indication of any interest in the eastern portion of this land lot.

The Court further finds beginning in 1982 Georgia Marble began to file, along with its regular taxpayer return, a letter with lists attached to it showing land and mineral interest separately. That the letter attached to the return showed a separate additional evaluation as being added to its tax return, beginning at $75,000.00 and later

ending up at $100,000.00 dollars, due to its concern that its mineral interest might be lost subsequent to the enactment of O.C.G.A. §44-5-168. That Georgia Marble explains to Pickens County Taxing Authority that it used this method of returning tax on its mineral interest as an attempt to prevent loss of its mineral interest through operation of O.C.G.A. §44-5-168 and also because of the universal acknowledged difficulty in valuing unexploited mineral interests; that Georgia Marble therefore sought an agreement with the taxing authorities of Pickens County to pay some figure to protect this mineral interest; that the Tax Commissioner and Tax Assessors Office agreed to this procedure, and; that Georgia Marble has in fact paid taxes on all property that it returned and also on the lump sum value of mineral interest not specifically designated.

After a thorough review of all the tax records of the Assessors office, the exhibits admitted by Defendant and exhibits admitted by Plaintiff, the Court finds as a matter of fact that Georgia Marble did not return the mineral interest in Land Lot No. 125, 4th Dist. and 2nd Section. The Court further finds, based on all evidence in the Tax Assessors Office, including the tax returns over the years, including the tax years 1980 through 1986, that the designation "751 (under acres) - Land Lot No. 105, 106, 123, 124, 125, 85, 86, 107, 84, 4th and 2nd refers simply to the fee simple title to the 45 acres more or less of land in Land Lot 125, 4th District, 2nd Sect. in which it owned the surface rights only [so called Cowart property and shown on tax records as "except mineral interest" (Cowart)]. Using Georgia Marble's records, the totality of the surface land in these land lots is approximately 831 acres (and according to the Tax Assessors Office records for these land lots the total is approximately 774 acres).

The Court further finds that there can be no doubt that this designation on the tax returns and on the Tax Assessors Office records refer simply to fee simple title and not mineral interest in the east portion of Land Lot No. 125. The actual returns for the years 1980-86 clearly

show that Georgia Marble was returning that property which had previously been returned; and that all the letters attached or sent with the taxpayers yearly return states that the lists are the same as had been previously submitted, adjusted for acquisitions and sales. Georgia Marble Company actually submits a list of that in which it owned fee simple title and an additional list of that in which it owned mineral interest. The records of the Tax Assessors office do not indicate that it considered any values for mineral interest or land in Land Lot No. 125, 4th Dist. 2nd Section other than that which was submitted by Georgia Marble. Furthermore, the records do not indicate that Georgia Marble or the Tax Assessors office at any time placed any evaluation on the mineral interest in that portion of the property which belongs to the Whitlocks or charged it to the Georgia Marble tax returns.

## CONCLUSION OF LAW

The Whitlocks, fee simple owners of approximately 120 acres in the eastern portion of Land Lot 125 of the 4th District, 2nd Section of Pickens County, bring this action against Georgia Marble for Declaratory Judgment under O.C.G.A. §44-5-168 claiming ownership by adverse possession of certain mineral rights.

O.C.G.A. §44-5-168 provides in part as follows:

> (a) Whenever mineral interests are conveyed or whenever real property is conveyed in fee simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have *neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven*

*years immediately preceding the filing of the petition for in subsection (b) of this Code section.*
*.....)*

Defendant Georgia Marble Company contends that O.C.G.A. §44-5-168 is unconstitutional as a taking of property without just compensation.

The statute in question does not divest the mineral owners of his rights; it simply conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public's benefit. The General Assembly of the State of Georgia, under its police power, had authority to pass said act. It serves the dual purposes of encouraging the use of the State's mineral resources and the collection of taxes, *or to encourage the use of land free of interference by holders of mineral interest who neither used nor paid taxes upon them* and as such, it is a reasonable exercise of the State's police power. The statute is therefore constitutional. *Hayes v. Howell*, 251 Ga. 580 at 584.

Defendant also argues that as applied to the facts of this case the statute should be found unconstitutional. The Defendant appears to be arguing that it has paid taxes on the subject property through its "lump sum" payment method or by the additional evaluation of $75,000.00 to $110,000.00 dollars for its unlisted, unmined or unvalued mineral interest. This contention simply does not stand the muster. The lump sum payment of taxes or the lump sum evaluation of values for billing purposes by Pickens County on land and mineral interest actually returned, or mineral interest actually valued and considered by Pickens County Tax Assessors is not brought into play in the instant case. There is no question but that Georgia Marble has paid taxes on some mineral interest that they owned and returned and which was considered by the Tax Assessors Office in arriving at a valuation of its property. Under O.C.G.A. §44-5-168 Defendant could not lose its property (which it returned or was actually considered by Tax Assessor's) under these circumstances inasmuch as

the taxes admittedly have been paid. Defendant's contention in this respect is simply another way of stating the ultimate issue to be decided by this Court, that is, has Defendant paid taxes on the mineral rights on the specific property owned by Plaintiff within seven (7) years prior to the filing of this lawsuit. If it has not, then the statute as applied to this particular case would not be unconstitutional.

Under O.C.G.A. §44-5-168, the ultimate issue to be decided by the Court "whether or not the Defendant has paid taxes due on the mineral interest appurtenant to Plaintiff's property" inasmuch as it has been stipulated that Georgia Marble has not attempted to work or worked the mineral interest.

The payment of ad valorem taxes necessarily includes the returning of the property for tax purposes. To determine whether taxes were paid necessarily requires that there be some identifiable method in order to determine what property was considered and valued for tax purposes. The returning of property is a necessary ingredient of paying taxes. In the case of *Dubbers-Albrecht v. Nathan*, 257 Ga. 111 at 112, the Supreme Court of Georgia held:

". . . O.C.G.A. § 48-5-10 and 48-5-15 (a) place a duty on the owner of improved and unimproved real property subject to taxation to return the property annually for ad valorem taxes to the tax commissioner of the county in which the property is located. We have stated that '[t]he preservation of the mineral owner's claim under O.C.G.A. §44-5-168 [depends] only upon his use of the minerals *or returning them for taxes.*' *Hayes v. Howell*, 251 Ga. 580, 583 (308 SE2d 170) (1983). (Emphasis supplied.) We hold that to retain his interest in the mineral rights, the owner must attempt to work or work the mineral rights *or return* the property for *and pay* ad valorem taxes . . . (Emphasis supplied.)

O.C.G.A. §44-5-168 cannot be considered separate and apart from the other statutes dealing with taxation of property in Georgia.

O.C.G.A. §48-5-3 provides:

> "All real property including, but not limited to, leaseholds, interests less than fee, and all personal property shall be liable to taxation and shall be taxed, except as otherwise provided by law. Liability of property for taxation shall not be affected by the individual or corporate character of the property owner or by the resident or nonresident status of the property owner".

O.C.G.A. §48-5-6 provides "All property shall be returned for taxation at its fair market value".

O.C.G.A. §48-5-10 provides:

> "All property shall be returned by the taxpayers for taxation to the tax commissioner or tax receiver as provided by law. Each return by a taxpayer shall be for property held and subject to taxation on January 1 next preceding each return".

O.C.G.A. §48-5-15 provides:

> (a) All improved and unimproved real property in this state which is subject to taxation shall be returned in person or by mail by the person owning the real property or by his agent or attorney to the tax receiver or tax commissioner of the county where the real property is located.
>
> (b) If the real property has a district, number, and section designation, the tax receiver or tax commissioner shall require the person making a return of the real property to return it by district, number and section designation. If the real

property has no designation by district, number and section, it shall be returned by such description as will enable the tax receiver or tax commissioner to identify it.

(c) No tax receiver or tax commissioner shall receive any return of real property which does not designate the real property as provided in this Code section. The commissioner shall not allow any tax receiver or tax commissioner who receives returns in any manner other than as provided in this Code section any compensation or percentage for his services".

Since Pickens County is one of the counties surveyed into land lots, districts and section, Georgia Marble was obligated by the above statutes to return its interest by land lot, districts and section. The Pickens County taxing authorities, also, were obligated by the statutes to refuse any attempt to return property or to pay taxes otherwise.

Inasmuch as the only question for determination in this lawsuit is whether Georgia Marble paid taxes on any mineral interest in Plaintiff's property from the period of September 1980 through September 1987 (tax years 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987) the only way to determine the answer to this question is to look at the entire tax records of Pickens County. This would include the Tax Digest, and the entire records of the Tax Commissioner (Tax Receiver and Tax Collector Offices consolidated, Acts of 1943) and the Tax Assessors Office.

Examination of the Tax Digest reveals nothing from which it could be determined that there was a payment of taxes on the specific property in question.

The Tax Commissioners Office and the Tax Assessors Office records are next examined and the first item to look at would be the tax returns as filed by the Defendant. Defendant contends that its tax return shows that it returned the mineral interest on the property in question.

This simply is not a reasonable inference to be drawn from the record. Almost continuously since 1968 in all of the returns made by Georgia Marble, Land Lot 125, 4th Dist. 2nd Section is always listed in conjunction with other land lots which are designated as 751 acres.

Prior returns listed the property as part of a larger tract. A few times prior to 1968 Land Lot 125 was listed as 160 acres (which even Georgia Marble does not contend it ever owned that much of Land Lot 125). Using the figures of the tax office as well as Georgia Marble's own record of their ownership of property which is attached as Exhibit B to Mr. James Looney's affidavit (Defendant's Exhibit B), it is clear that the property that was being returned in Land Lot 125 was the surface interest only that Georgia Marble owned in the 45 acres more or less (Georgia Marble's records indicate 30 acres more or less at one point). The Tax Assessors Office records clearly indicate that Georgia Marble owned surface interest in 45 acres +- of Land Lot 125, 4th Dist. 2nd Section, except for mineral interest (Cowart) (Plaintiff Exhibit No. 6, Mr. Groover's records and also the property cards dealing with Georgia Marble's property).

The property cards in the Tax Assessors' Office reveal only ownership of 195 acres more or less in Land Lots 124 and 125, surface rights only. (Plaintiffs' Exhibit 6, (Bates stamped "176")]. This is a property card for the property that Georgia Marble owns in fee simple title subject to mineral interests outstanding in Cowart estate, adjacent to the western boundary of Plaintiffs' property. Georgia Marble has never owned any portion of the fee of the Whitlock property, thus a payment on "surface rights only" could not be a payment on the mineral interest appurtenant to the Plaintiffs' property. Also the maps (specifically No. 25) provided to Tax Assessors Office by Georgia Marble (although not considered to be completely accurate by Georgia Marble) show nothing which would be inconsistent with the information on the cards and records showing surface only - 195 acres Land Lot 124-125, nor could it possibly support Defendants' contentions.

This Court cannot reasonably conclude or infer that the interest referred to on the returns as being in Land Lot No. 125, 4th Dist. 2nd Section as a part of the 751 acres was anything other than the 45 acres +- of surface rights in which the mineral interest were excepted (Cowarts). Further Georgia Marble, in its returns, would almost always list a separate page of properties designated as "mineral interest only" and in none of these did the minerals interest in Land Lot No. 125, 4th-2nd appear. (Defendant's Exhibits Q - U).

Beginning with tax year 1982, at the bottom of each of those pages listed as "mineral interest only", Georgia Marble would put "The Georgia Marble Company owns other mineral interest in county according to deed records which are not listed because they have no known value". These were attached to Mr. Sibley's letters in all years except the ones in which there was only one page attached to its return.

This addition was placed upon its return due to Georgia Marble's concern for possible loss of mineral interest due to the enactment of O.C.G.A. §44-5-168 (Defendant's trial Exhibit A). The taxing authority of Pickens County apparently agreed to accept the Defendant's return in such a manner (Defendant's trial Exhibits A, C, D, F, G and I).

Notwithstanding the efforts of Georgia Marble and Pickens County taxing authority to avoid the consequences of O.C.G.A. §44-5-168, the Defendant simply did not comply with the mandate of this statute and the other statutes requiring the said property be returned with specificity, i.e., district, number and section.

A taxpayer cannot rely on the decision of a taxing authority when that decision is in contravention of the unambiguous requirements of a statutory provision. *Suttle v. Northwest Mutual Life Ins. Co.*, 193 Ga. 495 (1942). Similarly, any attempt by the taxing authorities to sidetrack, backtrack, or extrapolate payment of taxes from the existing tax records of Pickens County by agreement, in-

tentionally or otherwise is impossible because of this rule of law. Notwithstanding any agreements between Georgia Marble Company and Pickens County Taxing Authority, Georgia Marble nor Pickens County Taxing Authority was relieved of their duty to return property with specificity for tax purposes. Furthermore, the resolution of the Pickens County Board of Tax Assessors cannot relieve Georgia Marble from its duties and add nothing to this proceeding.

The Court has reviewed all of the documents presented by each party for the purpose of determining if an actual return was made of the mineral interest in Plaintiff's property and the court is unable to find any indication that the tax payer returned, intended to return, or that the Tax Assessors intended and did tax Georgia Marble for its mineral interest appurtenant to the property of the Plaintiff, notwithstanding the affidavits of various officials of Georgia Marble, affidavits of the various Tax Assessors and officials of Pickens County, or the resolution of the Board of Tax Assessors of Pickens County.

The Court therefore finds as a matter of law that Georgia Marble did not return the mineral interest in Land Lot No. 125, 4th Dist. 2nd Section to which Plaintiff owns the fee for the tax years of 1980 through 1987; that none of the prior returns of Georgia Marble reflect that said mineral interest was being returned for taxes; that the Tax Assessors of Pickens County did not value said mineral interest and add the same to the other mineral interest being taxed to Georgia Marble; and that in fact Georgia Marble did not pay taxes on the mineral interest in the land owned by Plaintiffs.

If Georgia Marble had in fact returned the mineral interest in the land owned by Plaintiff or if in fact Pickens County Tax Assessors had valued the same and assessed it with the other values of property of Georgia Marble, the mere fact that there was a lump sum evaluation by the Tax Commissioner for billing purposes would not be sufficient for this Court to find that Georgia Marble had

failed to pay taxes on the subject property pursuant to O.C.G.A. §44-5-168.

From a consideration of the facts and law, this Court finds that Plaintiffs are entitled to relief as prayed for.

It is therefore ORDERED and ADJUDGED that the mineral interest involved, to wit: those appurtenant to Plaintiff's property as set forth in their petition, have been lost by Defendants and that Plaintiffs have gained absolute title to such mineral rights.

This 18th day of Sept., 1989.

/s/ Bobby C. Milam
JUDGE OF SUPERIOR COURTS
APPALACHIAN JUDICIAL CIRCUIT

FILED IN OFFICE
This 19 day of Sept., 1989

/s/ Marsha Baines
Dep. Clerk Superior Court

Appendix D

**RESOLUTION**

The Pickens County Board of Tax Assessors met on January 4, 1988, and considered certain issues that have been raised in connection with the payment of taxes by The Georgia Marble Company. Pursuant to O.C.G.A. §§ 48-5-299, 48-5-305, 48-5-306, and other pertinent statutory sections, the Board of Tax Assessors has a duty to inquire into whether property owned in the county is subject to taxation and whether it has been properly assessed and the taxes collected. It is this Board's duty to make such investigation as may be necessary to determine whether property has been properly assessed and the taxes paid and collected on it.

This Board has reviewed a number of the returns filed by Georgia Marble, both prior to and after 1979, and including its most recent return filed on March 10, 1987. This Board has also reviewed portions of the tax records of Pickens County and has had available to it and considered such other evidence and information as it deemed relevant.

Based on its review, this Board adopts the following finding and resolution:

THEREFORE, BE IT RESOLVED, THAT:

The Board of Tax Assessors of Pickens County hereby finds and determines that The Georgia Marble Company has paid all taxes due and owing from it through and including the year 1987. This Board further finds that, prior to the late 1970's, when all of Georgia Marble's property was separately assessed, Georgia Marble was assessed and paid taxes on Land Lot 125 of the 4th District of the 2nd Section. Because of the administrative difficulty and burden of keeping track of all of Georgia Marble's property in Pickens County, however, Georgia Marble and Pickens County agreed in the late 1970's to change the manner of assessing Georgia Marble's property to a lump sum as-

sessment covering all of the property previously returned by Georgia Marble on a tax digest and not thereafter deleted by Georgia Marble. That lump sum assessment and the taxes calculated as a result of it included the property previously listed on Pickens County tax digests as Land Lot 125, 4th District, 2nd Section. Georgia Marble has, since that time, paid all of the taxes due and assessed against it as a result of the lump sum assessment and this Board therefore determines that it has paid taxes on the real property known as Land Lot 125, 4th District, 2nd Section.

In addition, since 1982, Georgia Marble has added $75,000 of real property valuation to the lump sum assessment in order to cover all possible mineral interests. The addition of this sum to the lump sum payment was specifically discussed by Georgia Marble with county employees and officials and agreed to by Pickens County in order to make certain that Georgia Marble paid taxes on any possible interests it owned and to simplify the Collection of Taxes on Unmined Minerals. This Board has previously received letters from Georgia Marble Company, including a letter of March 10, 1987 in which an additional return of $100,000 was made by Georgia Marble Company in order to cover all mineral rights owned by it. Therefore, this Board further determines that it was the intent of Pickens County to accept the additional return of $100,000.00 to cover all contingent, known or unknown mineral interests held or claimed by Georgia Marble Company, and that Georgia Marble Company has therefore paid taxes on all interests owned by it in Pickens County, including any interest owned by it in Land Lot 125, 4th District, 2nd Section.

This Board is aware of the fact that payment of taxes by Georgia Marble is the subject of litigation presently pending in the Superior Court of Pickens County and is aware that this resolution may be used in such litigation.

SO RESOLVED, this 4th day of Jan., 1988.

/s/Joe H. Walker

/s/Robert J. Cagle
/s/William Dillard

ATTESTED BY:

/s/Terry W. Cantrell
Terry Cantrell, Secretary
to the Board of Tax Assessors

**44-5-168. Presumption of adverse possession of mineral rights under certain conditions; procedure to obtain title on basis of adverse possession; applicability of this Code section to leases for term of years or to licensed mining operators.**

(a) Whenever mineral rights are conveyed or whenever real property is conveyed in fee simple but the mineral rights to such property are reserved by the grantor, the owner of the real property in fee simple or his heirs or assigns may gain title to such mineral rights by adverse possession if the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid any taxes due on them for a period of seven years since the date of the conveyance and for seven years immediately preceding the filing of the petition provided for in subsection (b) of this Code section.

(b) In order to obtain absolute title to mineral rights in the circumstances described in subsection (a) of this Code section:

(1) The owner of the real property in fee simple or his heirs or assigns may file in the superior court for the county where the land is located a petition requesting relief in the nature of declaratory judgment. The petition:

(A) Shall contain all essential, required paragraphs, including jurisdiction;

(B) Shall contain the name and last known address of the grantor of the property reserving the mineral rights and the names and last known addresses of his heirs or assigns or any other person

known by the plaintiff to have an interest in the mineral rights;

(C) Shall show:

(i) That the plaintiff or his predecessors in title were granted and obtained a deed for the property in question;

(ii) That the conveyance reserved mineral rights or that the plaintiff or his predecessors in title conveyed the mineral rights and reserved or retained the fee simple title to the real property; and

(iii) That, for a period of seven years preceding the filing of the petition after the conveyance, the owner of the mineral rights or his heirs or assigns have neither worked nor attempted to work the mineral rights nor paid taxes on them; and

(D) Shall include any and all prayers regarding the land that the plaintiff may desire. Specifically, the petition may pray that the court find that the plaintiff has obtained title to the mineral rights through adverse possession and that the plaintiff be granted title to mineral rights;

(2) Upon a finding in the plaintiff's favor, the court shall issue a judgment and decree declaring that the mineral rights involved have been lost and that the plaintiff has gained absolute title to such mineral rights; and

(3) Service shall be perfected in the same manner as service on defendants in an in rem proceeding, including service by publication.

(c) Nothing in this Code section shall restrict the court from granting further plenary relief, whether legal or equitable; and the failure of the petition in the plaintiff's favor shall not affect the right of the plaintiff to any other relief, legal or equitable, to which he may be entitled.

(d) Any person named in the petition or any person having an interest in the mineral rights shall have the right to intervene in a case brought under this Code section.

(e) In order to maintain the status quo pending the adjudication of the questions or to preserve equitable rights, the court may grant injunctions and other interlocutory extraordinary relief.

(f) Nothing in this Code section shall apply to a lease for a specific number of years nor to an owner of mineral rights who has leased the mineral rights in writing to a licensed mining operator as defined in Part 3 of Article 2 of Chapter 4 of Title 12. (Code 1933, § 85-407.1, enacted by Ga. L. 1975, p. 725, § 1; Ga. L. 1987, p. 3, § 44.)

**48-5-6. Return of property at fair market value.**

All property shall be returned for taxation at its fair market value. (Ga. L. 1909, p. 36, § 15; Civil Code 1910, § 1003; Code 1933, § 92-5701; Code 1933, § 91A-1007, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1979, p. 5, § 21.)

**48-5-7. Assessment of tangible property.**

(a) Taxable tangible property shall be assessed at 40 percent of its fair market value and shall be taxed on a levy made by each respective tax jurisdiction according to 40 percent of the property's fair market value.

(b) The requirement contained in this Code section that all tax jurisdictions assess taxable tangible property at 40 percent of fair market value shall not apply to any tax jurisdiction whose ratio of assessed value to fair market value exceeded 40 percent for the tax year 1971. No tax jurisdiction so exempted shall assess at a ratio of less than 40 percent.

(c) Each notice of ad valorem taxes due sent to taxpayers of counties and municipalities shall include both the fair market value of the property of the taxpayer which is subject to taxation and the assessed value of the property after being reduced as provided by this Code section. (Ga. L. 1851-52, p. 288, § 14; Code 1863, § 734; Code 1868, § 801; Code 1873, § 804; Code 1882, § 804; Civil Code 1895, § 770; Ga. L. 1909, p. 36, § 1; Civil Code 1910, § 1010; Code 1933, § 92-5703; Ga. L. 1968, p. 358, § 2; Ga. L. 1972, p. 1102, § 1; Ga. L. 1975, p. 1083, § 1; Ga. L. 1976, p. 518, § 1; Code 1933, § 91A-1019, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1979, p. 5, § 26.)

**48-5-15. Returns of taxable real property.**

(a) All improved and unimproved real property in this state which is subject to taxation shall be returned in person or by mail by the person owning the real property or by his agent or attorney to the tax receiver or tax commissioner of the county where the real property is located.

(b) If the real property has a district, number, and section designation, the tax receiver or tax commissioner shall require the person making a return of the real property to return it by district, number, and section designation. If the real property has no designation by district, number, and section, it shall be returned by such description as will enable the tax receiver or tax commissioner to identify it.

(c) No tax receiver or tax commissioner shall receive any return of real property which does not designate the real property as provided in this Code section. The commissioner shall not allow any tax receiver or tax commissioner who receives returns in any manner other than as provided in this Code section any compensation or percentage for his services. (Ga. L. 1872, p. 77, § 1; Code 1873, § 873; Code 1882, § 873; Civil Code 1895, § 820; Civil Code 1910, § 1068; Code 1933, § 92-6206; Ga. L. 1964, p. 333, § 1; Code 1933, § 91A-1011, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-1. Procedures for sales under tax levies and executions.**

(a) Except as otherwise provided in this title, when a levy is made upon real or personal property, the property shall be advertised and sold in the same manner as provided for executions and judicial sales. Except as otherwise provided in this title, the sale of real or personal property under a tax execution shall be made in the same manner as provided for judicial sales; provided, however, that in addition to such other notice as may be required by law, in any sale under a tax execution made pursuant to this chapter, the defendant shall be given ten days' written notice of such sale by registered or certified mail. The notice required by this Code section shall be sent:

(1) In cases of executions issued by a county officer for ad valorem taxes, to the defendant's last known address as listed in the records of the tax commissioner of the county that issued the tax execution; or

(2) In cases of executions issued by a state officer, to the defendant's last known address as listed in the records of the department headed by the issuing officer.

(b) If two or more executions have been levied against a defendant, or if two or more in rem executions have been levied against the same unreturned property, such executions may be aggregated and a single sale may be conducted for the total amount due, as in the case of a single execution. (Orig. Code 1863, §§ 811, 813; Code 1868, §§ 891, 893; Code 1873, §§ 888, 890; Ga. L. 1876, p. 30, § 1; Code 1882, §§ 888, 890; Civil Code 1895, §§ 905, 907; Civil Code 1910, §§ 1165, 1167; Code 1933, §§ 92-8101, 92-8102; Code 1933, § 91A-401, enacted by Ga. L. 1978, p. 309, § 2; Ga.

L. 1983, p. 884, § 3-34; Ga. L. 1985, p. 1243, § 4; Ga. L. 1988, p. 1957, § 1; Ga. L. 1990, p. 1875, § 2.)

**48-4-2. Assessment and disposition of unreturned property.**

When property which has not actually been returned by anyone is assessed for taxes, the tax collector or tax commissioner shall issue an execution against the property as soon as it is assessed for the amount due and costs. The sheriff shall advertise the property for sale in the newspaper in which sheriff's sales are advertised once a week for four weeks before the day of sale. If the taxes are not paid by the day of the sale, the property shall be sold, but only if renting or hiring the property will not bring the requisite amount. Surplus from a sale after the payment of the taxes and costs shall be paid over to the county governing authority as a part of the educational fund, together with a statement of the property and account of sales, subject to the claim of the true owner within four years. (Orig. Code 1863, § 819; Code 1868, § 899; Code 1873, § 897; Code 1882, § 897; Civil Code 1895, § 908; Civil Code 1910, § 1168; Code 1933, § 92-8103; Code 1933, § 91A-402, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1984, p. 660, § 1.)

**48-4-3. Duties of levying officers.**

The tax collector or tax commissioner may place his executions in the hands of any constable of the county, who shall be authorized to collect or levy the executions in any part of the county. The constable or other levying officer to whom the tax collector or tax commissioner delivers the tax executions for collection shall proceed promptly to enforce by levy and sale the collection of the executions. The levying or collecting officer shall make prompt settlements with the tax collector or tax commissioner and in no event shall be allowed longer than 90

days from the time the executions are placed in his hands within which to make final settlement with the tax collector or tax commissioner and return to the tax collector or tax commissioner the tax collected and the uncollected executions with proper entries on the executions. Any constable or other levying officer who fails or refuses to make a final return or settlement within the time provided in this Code section shall forfeit all costs due him on the executions and shall be subject to be ruled before any court of competent jurisdiction and made to account as required by this Code section. (Orig. Code 1863, § 812; Code 1868, § 892; Code 1873, § 889; Code 1882, § 889; Civil Code 1895, § 906; Ga. L. 1899, p. 26, § 1; Civil Code 1910, § 1166; Code 1933, § 92-8104; Code 1933, § 91A-403, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-4. Purchase by one obligated to pay.**

One who is obligated to pay a tax on property cannot strengthen his title by purchasing the property at a tax sale. Each such purchase shall be treated as payment for the tax due. (Civil Code 1895, § 904; Civil Code 1910, § 1164; Code 1933, § 92-8105; Code 1933, § 91A-404, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-5. Payment of excess.**

If there is any excess after paying taxes, costs, and all expenses of a sale, it shall be immediately paid to the person authorized to receive the excess. (Orig. Code 1863, § 814; Code 1868, § 894; Code 1873, § 892; Code 1882, § 892; Civil Code 1895, § 912; Civil Code 1910, § 1175; Code 1933, § 92-8106; Code 1933, § 91A-405, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-6. Validity of deed made at tax sale.**

The deed or bill of sale made by the sheriff to the purchaser at a tax sale shall be just as valid as if made under an ordinary execution issuing from the superior court. (Orig. Code 1863, § 815; Code 1868, § 895; Code 1873, § 893; Code 1882, § 893; Civil Code 1895, § 913; Civil Code 1910, § 1176; Code 1933, § 92-8107; Code 1933, § 91A-406, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-7. Authority of levying officer to put purchaser in possession of land.**

The officer selling property at a tax sale shall have the authority to put purchasers in possession of land sold under tax fi. fas., as in other cases. (Orig. Code 1863, § 816; Code 1868, § 896; Code 1873, § 894; Code 1882, § 894; Civil Code 1895, § 914; Civil Code 1910, § 1177; Code 1933, § 92-8108; Code 1933, § 91A-407, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-20. Authority of counties to buy property sold under tax executions.**

(a) The governing authority of any county may purchase and hold in its official capacity any real property offered for sale by virtue of tax executions, except that the governing authority may bid on the real property only when other bids do not cover the amount of the tax executions and costs.

(b) The governing authority of the county shall not bid more for the property than the amount of taxes and costs. The governing authority, upon bidding on any property, shall draw its warrant on the county treasurer to pay to the levying officers the costs due on the tax executions and costs accrued in effecting the sales. The governing authority of the county shall not be required to pay

the proportionate part of the taxes due the state, any school district, or any other political subdivision or authority of counties by virtue of the tax sale until the real property is redeemed in the manner provided in this chapter or is resold by the governing authority of the county.

(c) The 12 months' redemption period allowed under this chapter for the redemption of realty sold under a tax execution shall begin to run from the date of the sale; provided, however, that the redemption period for any realty sold under a tax execution before April 22, 1981, shall expire on December 31, 1988. (Ga. L. 1892, p. 252, § 1; Civil Code 1895, § 915; Civil Code 1910, § 1178; Code 1933, § 92-8201; Ga. L. 1937, p. 446, § 1; Code 1933, § 91A-420, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1981, p. 1857, § 9; Ga. L. 1988, p. 1957. § 2.)

**48-4-21. Right of redemption; disposition of unredeemed property by county governing authority.**

(a) When real property sold under and by virtue of tax executions is successfully bid on by the governing authority of a county, the owner of such property shall have the privilege of redeeming it as in other cases.

(b) The governing authority of the county may dispose of real property purchased under a tax execution, and remaining unredeemed, as provided in this title. (Ga. L. 1892, p. 252, §§ 2, 3; Civil Code 1895, §§ 916, 917; Civil Code 1910, §§ 1179, 1180; Code 1933, §§ 92-8202, 92-8203; Code 1933, §§ 91A-421, 91A-422, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-22. Authority of counties to buy property sold under tax executions; finality of tax execution sales; issuance of "Bill of Sale for Personal Property."**

(a) The governing authority of any county may purchase and hold in its official capacity any personal property offered for sale by virtue of tax executions, except that the governing authority may bid on the personal property only when other bids do not cover the amount of tax executions, accrued interest, penalties, and costs.

(b) The governing authority of the county shall not bid more for the property than the amount of taxes, accrued interest, penalties, and costs. The governing authority, upon bidding on any property, shall draw its warrant on the county treasurer to pay to the levying officers the costs due on the tax executions and costs accrued in effecting tax sales. The governing authority of the county shall not be required to pay the proportionate part of the taxes due the state, any school district, or any other political subdivision or authority of counties by virtue of the tax sale until the personal property is resold by the governing authority of the county in the manner provided by law.

(c) When personal property is sold under tax executions at a tax sale, the sale is final.

(d) The officer authorized to conduct tax sales shall issue a "Bill of Sale for Personal Property" to the purchaser at the tax sale, and it shall be substantially as follows:

STATE OF GEORGIA

_____ COUNTY

BILL OF SALE FOR PERSONAL PROPERTY

This assignment made _____, between the tax commissioner and ex officio sheriff of _____ County, and _____, as purchaser,

Witnesseth: That,

Whereas, in obedience to writ(s) of fieri facias issued against _____, the taxpayer and defendant in fi. fa., for unpaid state, county, and applicable school taxes for the years _____, said tax commissioner and ex officio sheriff of _____ County did on _____, seize, levy, and serve notice on the within described personal property and, after the same being duly advertised agreeable to law, expose the said property within the legal hours of sale, at public outcry before the courthouse door in _____ County, Georgia, on the day and year first above written, when and where the same was knocked down to the named purchaser for the highest and best bid amount shown below, said purchaser being the highest and best bidder.

Now, therefore, in consideration of the sum of $_____, receipt of which is hereby acknowledged, the tax commissioner and ex officio sheriff of _____ County does assign, bargain, and sell, so far as the office of ex officio sheriff authorizes him, unto the said purchaser, heirs, and assigns,

To have and to hold the said described personal property, together with all the rights and also all the estate, right, title, interest, claim, or demand of the said taxpayer and defendant in fi. fa., heirs, and assigns, legal, equitable, or otherwise whatsoever, in and to the same, unto the said purchaser, heirs, and assigns,

_____

_____

In witness whereof, the said tax commissioner and ex officio sheriff of _____ County has set his hand and affixed his seal hereto on the day and year first above written.

_____
Tax commissioner and
ex officio sheriff of
_____ County, Georgia

Signed, sealed, and
delivered in the
presence of:

_____
Unofficial
witness

_____
Notary public

(Code 1981, § 48-4-22, enacted by Ga. L. 1984, p. 904, § 1.)

**48-4-40. Persons entitled to redeem land sold under tax execution; payment; time.**

Whenever any real property is sold under or by virtue of an execution issued for the collection of state, county, municipal, or school taxes or for special assessments, the defendant in fi. fa. or any person having any right, title, or interest in or lien upon such property may redeem the property from the sale by the payment of the redemption price or the amount required for redemption, as fixed and provided in Code Section 48-4-42:

(1) At any time within 12 months from the date of the sale; and

(2) At any time after the sale until the right to redeem is foreclosed by the giving of the notice provided for in Code Section 48-4-45. (Orig. Code 1863, § 820; Code 1873, § 898; Code 1882, § 898; Civil Code 1895, § 909; Civil Code 1910, § 1169; Code 1933, § 92-8301; Ga. L. 1937, p. 491, § 2; Code 1933, § 91A-430, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1980, p. 10, § 9.)

**48-4-41. Redemption by creditor without lien.**

If the property is redeemed by a creditor of the defendant in fi. fa. who has no lien, the creditor shall have a claim against the property for the amount advanced by him in order to redeem the property if:

(1) There is any sale of the property after the redemption under a judgment in favor of the creditor; and

(2) The quitclaim deed is recorded as required by law. (Ga. L. 1898, p. 85, § 4; Civil Code 1910, § 1171; Code 1933, § 92-8303; Code 1933, § 91A-432, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-42. Amount payable for redemption.**

(a) Except as otherwise provided in subsection (b) of this Code section, the amount required to be paid for redemption of property from any sale for taxes as provided in this chapter, or the redemption price, shall be the amount paid for the property at the tax sale, as shown by the recitals in the tax deed, plus any taxes paid on the property by the purchaser after the sale for taxes, plus a premium of 10 percent of the amount for each year or fraction of a year which has elapsed between the date of the sale and the date on which the redemption payment is made. If redemption is not made until after the required notice has been given, there shall be added to the

redemption price the sheriff's cost in connection with serving the notice, the cost of publication of the notice, if any, and the further sum of 10 percent of the amount paid for the property at the sale to cover the cost of making the necessary examinations to determine the persons upon whom notice should be served. All of the amounts required to be paid by this Code section shall be paid in lawful money of the United States to the purchaser at the tax sale or to his successors.

(b) In cases where a county, municipality, or other political subdivision purchases property at a tax sale, the amount required to be paid for redemption of property from any such sale for taxes as provided in this chapter, or the redemption price, shall be the amount paid for the property at the tax sale, as shown by the recitals in the tax deed, plus a premium of 20 percent of the amount for each year or fraction of a year which has elapsed between the date of the sale and the date on which the redemption payment is made. If redemption is not made until after the required notice has been given, there shall be added to the redemption price the sheriff's cost in connection with serving the notice, the cost of publication of the notice, if any, and the further sum of 20 percent of the amount paid for the property at the sale to cover the cost of making the necessary examinations to determine the persons upon whom notice should be served. All of the amounts required to be paid by this Code section shall be paid in lawful money of the United States to the purchaser at the tax sale or to his successors. (Ga. L. 1937, p. 491, § 2; Code 1933, § 91A-436, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1983, p. 822, § 1; Ga. L. 1984, p. 1016, § 1.)

**48-4-43. Effect of redemption.**

When property has been redeemed, the effect of the redemption shall be to put the title conveyed by the tax sale back into the defendant in fi. fa., subject to all liens

existing at the time of the tax sale. If the redemption has been made by any creditor of the defendant or by any person having any interest in the property, the amount expended by the creditor or person interested shall constitute a first lien on the property and, if the quitclaim deed provided for in Code Section 48-4-44 is recorded as required by law, shall be repaid prior to any other claims upon the property. (Ga. L. 1898, p. 85, § 3; Civil Code 1910, § 1170; Code 1933, § 92-8302; Code 1933, § 91A-431, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-44. Quitclaim deed by purchaser.**

(a) In all cases where property is redeemed, the purchaser at the tax sale shall make a quitclaim deed to the defendant in fi. fa., which deed shall recite:

(1) The name of the person who has paid the redemption money; and

(2) The capacity in which or the claim of right or interest pursuant to which the redemption money was paid.

(b) The recitals required by this Code section shall be prima-facie evidence of the facts stated. (Ga. L. 1898, p. 85, § 5; Civil Code 1910, § 1172; Code 1933, § 92-8304; Code 1933, § 91A-433, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-45. Notice of foreclosure of right to redeem; time; holders of unrecorded titles, liens, etc.; heirs.**

(a) After 12 months from the date of a tax sale, the purchaser at the sale or his heirs, successors, or assigns may terminate, foreclose, divest, and forever bar the right to redeem the property from the sale by causing a notice or notices of the foreclosure, as provided for in this article:

(1) To be served upon all of the following persons who reside in the county in which the property is located:

(A) The defendant in the execution under or by virtue of which the sale was held;

(B) The occupant, if any, of the property; and

(C) All persons having of record in the county in which the land is located any right, title, or interest in, or lien upon the property;

(2) To be sent by registered or certified mail to each of the persons specified in subparagraphs (A), (B), and (C) of paragraph (1) of this subsection who resides outside the county in which the property is located, if the address of that person is reasonably ascertainable; and

(3) To be published, if that tax sale occurs on or after July 1, 1989, in the newspaper in which the sheriff's advertisements for the county are published in each county in which that property is located, which publication shall occur once a week for four consecutive weeks in the six-month period immediately prior to the week of the redemption deadline date specified in the notice.

(b) Nothing contained in this Code section shall be construed to require that any notice be sent to or served upon any person whose right, title, interest in, or lien upon the property does not appear of record in the county in which the land is located.

(c) The heirs of any deceased owner of any land entitled to notice pursuant to this Code section shall be served by the sheriff or notified as provided in this article. (Ga. L. 1937, p. 491, § 2; Code 1933, § 91A-434, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1989, p. 1391; § 1.)

**48-4-46. Form of notice of foreclosure of right to redeem; service time; return and record; waiver.**

(a) The notice provided for in Code Section 48-4-45 shall be written or printed, or written in part and printed in part, and shall be in substantially the following form:

Take notice that:

The right to redeem the following described property, to wit: _____ will expire and be forever foreclosed and barred on and after the _____day of _____, 19_____.

The tax deed to which this notice relates is dated the _____ day of _____, 19_____, and is recorded in the office of the Clerk of the Superior Court of _____ County, Georgia, in Deed Book _____ at page _____.

The property may be redeemed at any time before the _____ day of _____, 19_____, by payment of the redemption price as fixed and provided by law to the undersigned at the following address: _____ _____.

Please be governed accordingly.

_____

(b) The purchaser at the tax sale or his heirs, successors, or assigns, as the case may be, shall make out an original notice in substantially the form prescribed in subsection (a) of this Code section and one copy of the notice for each person to be served with the notice. The purchaser shall deliver the notice and the copies together with a list of the persons to be served to the sheriff of the county in which the land is located not less than 45 days before the date set in each notice for the expiration of the right to redeem. Within 15 days after delivery to him, the sheriff shall serve a copy of the notice personally or by deputy

upon each of the persons included on the list furnished him who reside in the county. The sheriff shall make an entry of the service on the original copy of the notice. Leaving a copy of the notice at the residence of any person required to be served with the notice shall be a sufficient service of the notice.

(c) If the sheriff personally or by deputy makes an entry that he is unable for any reason to effect service upon any person required to be served, the person who requested that the service be made shall forthwith cause a copy of the notice to be published once a week for two consecutive weeks in the newspaper in which the sheriff's advertisements for the county are published, unless that notice is being published as provided in paragraph (3) of subsection (a) of Code Section 48-4-45. Either publication shall operate as and for all purposes shall be treated as service upon all persons as to whom the sheriff has made an entry that he has been unable to effect service.

(d) Each original notice together with the entry of the sheriff on the notice shall be returned to the person by whom the service was requested upon the payment of the sheriff's costs as provided by law. Any original notice together with the entries on the notice may be filed and recorded on the deed records in the office of the clerk of the superior court of the county in which the land is located.

(e) Service of notices as provided in this Code section may be waived in writing by any person required or entitled to be served with the notice. (Ga. L. 1937, p. 491, § 2; Code 1933, § 91A-435, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1982, p. 3, § 48; Ga. L. 1989, p. 1391, § 2.)

**48-4-47. Tender of redemption price before action to cancel tax deed.**

(a) After notice to foreclose the right of redemption as provided for in this article has been given, not action shall be filed, allowed, sanctioned, or maintained for the purpose of setting aside, canceling, or in any way invalidating the tax deed referred to in the notice or the title conveyed by the tax deed unless and until the plaintiff in the action pays or legally tenders to the grantee in the deed or to his successors the full amount of the redemption price for the property, as provided for in this article.

(b) Subsection (a) of this Code section shall apply unless it clearly appears that:

(1) The tax or special assessment for the collection of which the execution under or by virtue of which the sale was held was not due at the time of the sale; or

(2) Service or notice was not given as required in this article. (Ga. L. 1937, p. 491, § 2; Code 1933, § 91A-437, enacted by Ga. L. 1978, p. 309, § 2.)

**48-4-48. Ripening of tax deed title by prescription.**

(a) A title under a tax deed properly executed at a valid and legal sale prior to July 1, 1989, shall ripen by prescription after a period of seven years from the date of execution of that deed.

(b) A title under a tax deed executed on or after July 1, 1989, shall ripen by prescription after a period of four years from the date of execution of that deed.

(c) A tax deed which has ripened by prescription pursuant to any provision of this Code section shall convey, when the defendant in fi. fa. is not laboring under any le-

gal disability, a fee simple title to the property described in that deed, and that title shall vest absolutely in the grantee in the deed or in the grantee's heirs or assigns. In the event the defendant in fi. fa. is laboring under any legal disability, the prescriptive term specified in this Code section shall begin from the time the disabilities are removed or abated.

(d) Notice of foreclosure of the right to redeem property sold at a tax sale shall not be required to have been provided in order for the title to such property to have ripened under subsection (a) or (b) of this Code section. (Ga. L. 1949, p. 1132, § 1; Code 1933, § 91A-438, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1989, p. 1391, § 3.)

Appendix H

## DISPOSITION OF UNCLAIMED PROPERTY

**44-12-190. Short title.**

This article may be cited as the "Disposition of Unclaimed Property Act." (Ga. L. 1972, p. 762, § 1.)

**44-12-191. Uniformity of interpretation; legislative purpose.**

This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (Ga. L. 1972, p. 762, § 33.)

**44-12-192. Definitions.**

As used in this article, the term:

(1) "Banking organization" means any bank, regulated or certificated bank, trust company, or savings bank engaged in business in this state.

(2) "Business association" means any corporation, joint-stock company, business trust, partnership, or any association of two or more individuals for business purposes.

(3) "Financial organization" means any savings and loan association, building and loan association, credit union, or investment company engaged in business in this state.

(4) "Holder" means any person in possession of property subject to this article belonging to another, or who is a trustee in case of a trust, or who is indebted to another on an obligation subject to this article.

(5) "Insurance corporation" means any association or corporation transacting within this state the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities; disability and accident and health insurance; and property, casualty, and surety insurance as all said terms are defined in Chapter 7 of Title 33.

(6) "Owner" means a depositor in case of a deposit; a beneficiary in case of a trust; a creditor, claimant, or payee in case of other choses in action; or any person having a legal or equitable interest in property subject to this article or his legal representative.

(7) "Person" means any individual, business association, governmental or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(8) "Utility" means any person who owns or operates within this state for public use any plant, equipment, property, franchise, or license for the transmission of communications or for the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas. (Ga. L. 1972, p. 762, § 2.)

**44-12-193. When property held by banking or financial organizations presumed abandoned.**

The following property held or owing by a banking or financial organization is presumed abandoned:

(1) Any demand, savings, or matured time deposit made in this state with a banking organization, together with any interest or dividend thereon, excluding any charges that may lawfully be withheld unless the owner has within 15 years:

(A) Increased or decreased the amount of the deposit or presented the passbook or other similar evidence of the deposit for the crediting of interest;

(B) Corresponded in writing with the banking organization concerning the deposit; or

(C) Otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization;

**44-12-203. Report of abandoned property held by banking or financial organizations; with whom filed; time for filing; duty to search for owner if whereabouts unknown; service charges.**

(a) Every person holding funds or other property, tangible or intangible, which is presumed abandoned under Code Section 44-12-193 and every banking or financial organization holding funds or other property, tangible or intangible, presumed abandoned under Code Section 44-12-198 shall report to the state revenue commissioner with respect to the property. The report shall be verified and shall include:

(1) The name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property worth $25.00 or more which is presumed abandoned under Code Section 44-12-193 or 44-12-198;

(2) The date when the property became payable, demandable, or returnable and the date of the last transaction with the owner with respect to the property; and

(3) Any other information which the state revenue commissioner prescribes by rule as necessary for the administration of this Code section.

(b) If the person holding property which is presumed abandoned is a successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(c) The report shall be filed before November 1 of each year and shall be dated as of the previous June 30. The state revenue commissioner may postpone the reporting date upon written request by any person required to file a report.

(d) If the holder of property which is presumed abandoned under Code Section 44-12-193 knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall communicate with the owner before filing the annual report and shall take the necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(e) Verification shall be executed by an officer of the banking or financial organization.

(f) The initial report filed under this Code section shall be filed by November 1, 1981.

(g) No banking or financial organization shall deduct a service charge from any account on which there has been no deposit or withdrawal for 12 or more months or otherwise impose a service charge on any such account. A service charge may be imposed for 12 months immediately following a deposit to or withdrawal from any such account. (Ga. L. 1972, p. 762, § 13; Ga. L. 1981, p. 977, § 1.)

**44-12-204. Notice and publication of lists of abandoned property; contents.**

(a) Within 120 days from the filing of the report required by Code Section 44-12-202 or 44-12-203, the state revenue commissioner shall cause notice to be published at least once each week for two successive weeks in an English language newspaper of general circulation in the county in this state in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside of this state, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within this state.

(b) The published notice shall be entitled "Notice of Names of Persons Appearing to be Owners of Abandoned Property" and shall contain:

(1) The names, in alphabetical order, and last known addresses, if any, of persons listed in the report and entitled to notice within the county;

(2) A statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the state revenue commissioner; and

(3) A statement that, if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within 65 days from the date of the second published notice, the abandoned property will be placed, not later than 85 days after such publication date, in the custody of the state revenue commissioner, to whom all further claims must thereafter be directed.

(c) The state revenue commissioner is not required to publish in such notice any item worth less than $25.00 unless he deems such publication to be in the public interest.

(d) Within 120 days from the receipt of the report required by Code Section 44-12-202 or 44-12-203, the state revenue commissioner shall mail a notice to each person having an address listed in the report who appears to be entitled to property worth $25.00 or more which is presumed abandoned under this article.

(e) The mailed notice shall contain:

(1) A statement that, according to a report filed with the director of the Fiscal Division of the Department of Administrative Services, property is being held to which the addressee appears entitled;

(2) The name and address of the person holding the property and any necessary information regarding changes of name and address of the holder; and

(3) A statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the state revenue commissioner, to whom all further claims must thereafter be directed. (Ga. L. 1972, p. 762, § 14; Ga. L. 1981, p. 977, § 2)

**44-12-205. Payment or delivery of abandoned property; procedure when presumption erroneous.**

Every person who has filed a report as provided by Code Section 44-12-202 or 44-12-203 shall, within 20 days after the time specified in Code Section 44-12-204 for claiming the property from the holder, pay or deliver to the state revenue commissioner all abandoned property

specified in the report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in Code Section 44-12-204 or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the state revenue commissioner, but in lieu thereof, the holder shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment. (Ga. L. 1972, p. 762, § 15; Ga. L. 1981, p. 977, § 3.)

**44-12-206. Payment or delivery to state; relief from liability; out-of-state legal proceedings against holder, notification of Attorney General and state revenue commissioner; direction of Attorney General as to defense; when holder reimbursed.**

(a) Upon the payment or delivery of abandoned property to the state revenue commissioner, the state shall assume custody and shall be responsible for the safekeeping of the property. Any person who pays or delivers abandoned property to the state revenue commissioner under this article is relieved of all liability, to the extent of the value of the property so paid or delivered, or for any claim which then exists or which thereafter may arise or be made with respect to the property. Any holder who has paid moneys to the state revenue commissioner pursuant to this article may make payment to any person appearing to such holder to be entitled thereto; and, upon proof of such payment and proof that the payee was entitled thereto, the state revenue commissioner shall forthwith reimburse the holder for the payment.

(b) In the event legal proceedings are instituted by any other state or states in any state or federal court with respect to unclaimed funds or abandoned property previ-

ously paid or delivered to the state revenue commissioner, the holder shall give written notification to the state revenue commissioner and the Attorney General of this state of such proceedings within ten days after service of process or at least ten days before the return date on which an answer or similar pleading is due or any extension thereof is secured by the holder. The Attorney General may take such action as he deems necessary or expedient to protect the interests of this state. The Attorney General, by written notice prior to the return date on which an answer or similar pleading is due or any extension thereof is secured by the holder, but in any event in reasonably sufficient time for the holder to comply with the directions received, shall either direct the holder actively to defend in the proceedings or direct that no defense need be entered in the proceedings. If a direction is received from the Attorney General that the holder need not make a defense, this shall not preclude the holder from entering a defense in his own name if he should so choose. However, any defense made by the holder on his own initiative shall not entitle the holder to reimbursement for legal fees, costs, and other expenses as is provided in this Code section with respect to defenses made pursuant to the direction of the Attorney General. After the holder has actively defended in the proceedings pursuant to a direction of the Attorney General or has been notified in writing by the Attorney General that no defense need be made with respect to such funds, if a judgment is entered against the holder for any amount paid to the state revenue commissioner under this article, the state revenue commissioner, upon being furnished either proof of payment or satisfaction of such judgment, shall reimburse the holder the amount so paid. The state revenue commissioner shall also reimburse the holder for any legal fees, costs, and other directly related expenses incurred in legal proceedings undertaken

pursuant to the direction of the Attorney General. (Ga. L. 1972, p. 762, § 16.)

**44-12-207. Entitlement to income accruing after payment or delivery.**

When property is paid or delivered to the state revenue commissioner under this article, the owner is not entitled to receive income or other increments accruing thereafter. (Ga. L. 1972, p. 762, § 17.)

**44-12-208. Effect of periods of limitation.**

The expiration of any period of time which is specified by law or court order as the time during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property shall not prevent the money or property from being presumed abandoned property nor shall it affect any duty to file a report required by this article or to pay or deliver abandoned property to the state revenue commissioner; provided, however, that holders shall not be required to report or to pay or deliver abandoned property as to which the period of the statute of limitations applicable to the enforcement of any claim to such property shall have expired prior to January 1, 1973. (Ga. L. 1972, p. 762, § 18.)

**44-12-209. Sale of abandoned property; location; advertisement; title acquired by purchaser.**

(a) All abandoned property, other than money delivered to the state revenue commissioner under this article, shall, within one year after the delivery, be sold by him to the highest bidder at public sale in whatever city in the state affords, in his judgment, the most favorable market for the property involved. The state revenue commissioner may decline the highest bid and reoffer the property for sale if he considers the price bid insufficient. He

need not offer any property for sale if, in his opinion, the probable cost of the sale exceeds the value of the property.

(b) Any sale held under this Code section shall be preceded by a single publication of notice thereof at least three weeks in advance of the sale in an English language newspaper of general circulation in the county where the property is to be sold.

(c) At any sale conducted by the state revenue commissioner pursuant to this article, the purchaser shall receive title to the property purchased, free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The state revenue commissioner shall execute all documents necessary to complete the transfer of title. (Ga. L. 1972, p. 762, § 19.)

**44-12-210. Deposit of funds received from sales; reimbursement trust fund; deductions.**

(a) All funds received under this article, including the proceeds from the sale of abandoned property under Code Section 44-12-209, shall immediately be deposited by the state revenue commissioner in the general funds of the state, except that the state revenue commissioner shall retain in a separate trust fund an amount not exceeding $100,000.00, from which he shall make prompt payment of claims duly allowed by him as provided in this article. Before making the deposit, he shall record the name and last known address of each person appearing from the holder's reports to be entitled to the abandoned property; the name and last known address of each insured person or annuitant; and, with respect to each policy or contract listed in the report of an insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

(b) Before making any deposit to the credit of the general funds, the state revenue commissioner may deduct:

(1) Any costs in connection with the sale of abandoned property;

(2) Any costs of mailing and publication in connection with any abandoned property; and

(3) Reasonable service charges. (Ga. L. 1972, p. 762, § 20.)

**44-12-211. Claim for abandoned property paid or delivered.**

Any person claiming an interest in any property delivered to the state under this article may file a claim to the property or to the proceeds from the sale of the property on the form prescribed by the state revenue commissioner. (Ga. L. 1972, p. 762, § 21.)

**44-12-212. Determination of claims; hearing and written decision; payment of claims without deductions.**

(a) The state revenue commissioner shall consider any claim filed under this article and may hold a hearing and receive evidence concerning it. If a hearing is held, he shall prepare a finding and a decision in writing on each claim filed which shall state the substance of any evidence heard by him and the reasons for his decision. The decision shall be a public record.

(b) If the claim is allowed, the state revenue commissioner shall make payment immediately. The claim shall be paid without a deduction for costs of notices or sale or for service charges. (Ga. L. 1972, p. 762, § 22.)

**44-12-213. Appeal of decision or failure to act; forum.**

Any person aggrieved by a decision of the state revenue commissioner or whose claim the state revenue commissioner has failed to act upon within 90 days after the filing of the claim may appeal such decision or lack of decision to the Superior Court of Fulton County. The proceeding shall be brought within 90 days after the decision of the state revenue commissioner or within 180 days of the filing of the claim if the state revenue commissioner fails to act. The appeal shall be tried de novo without a jury. (Ga. L. 1972, p. 762, § 23.)

**44-12-214. Election to take payment or delivery.**

After receiving reports of property deemed abandoned pursuant to this article, the state revenue commissioner may decline to receive any property reported which he deems to have a value less than the cost of giving notice and holding sale or he may if he deems it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within 120 days after filing the report required under Code Section 44-12-202, the state revenue commissioner shall be deemed to have elected to receive the custody of the property. (Ga. L. 1972, p. 762, § 24.)

**44-12-215. Examination of records in order to locate unreported property.**

The state revenue commissioner or the Department of Banking and Finance, as the case may be, may examine the records of any person at reasonable times and upon reasonable notice if there is reason to believe that such person has failed to report property that should have been reported pursuant to this article. (Ga. L. 1972, p. 762, § 25.)

**44-12-216. Proceeding to compel delivery of abandoned property.**

If any person refuses to deliver property to the state revenue commissioner as required under this article, the state revenue commissioner shall bring an action in a court of appropriate jurisdiction to enforce such delivery. (Ga. L. 1972, p. 762, § 26.)

**44-12-217. Administration of this article; unclaimed property division; appropriations.**

The state revenue commissioner shall create a division of his office, to be known as the Unclaimed Property Division, for the purpose of administering this article. An appropriation shall be made biennially for the maintenance of such division and to provide sufficient staff to enforce this article adequately. Other divisions of the office of the state revenue commissioner, as well as all state officers and employees generally, shall assist in the enforcement of this article in connection with the performance of their normal duties. (Ga. L. 1972, p. 762, § 27.)

**44-12-218. Rules and regulations.**

The state revenue commissioner and the Department of Banking and Finance are authorized to make necessary rules and regulations to carry out this article. (Ga. L. 1972, p. 762, § 29.)

**44-12-219. Effect of laws of other states.**

This article shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to January 1, 1973. (Ga. L. 1972, p. 762, § 30.)

**44-12-220. Effect on existing laws of this state.**

This article shall not be construed to apply to any property, tangible or intangible, which is a part of an estate subject to escheat under Article 8 of Chapter 5 of this title. (Ga. L. 1972, p. 762, § 31.)

**44-12-221. Penalties.**

Any person, firm, or corporation who willfully fails to render any report or to perform any other duties required under this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $1,000.00 or by confinement in the county or other jail not to exceed six months or by both such fine and imprisonment at the discretion of the court. (Ga. L. 1972, p. 762, § 28.)

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No. 90-683

In The

# Supreme Court of the United States

October Term, 1990

THE GEORGIA MARBLE COMPANY,

*Petitioner,*

v.

WALTER CECIL WHITLOCK AND
COLEEN J. WHITLOCK,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court of Georgia**

## BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 1

CONCLUSION ..... 4

# TABLE OF AUTHORITIES

Page

CASES

*Hayes v. Howell*, 251 Ga. 586, 308 S.E.2d 170 (1983) ...2, 4

*Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076 (1987) ..... 4

*Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 733 (1982)..... 1, 2, 3

*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340 (1988)..... 2

## STATEMENT OF THE CASE

While much of Petitioner's Statement of the Case is argumentative and does not fairly reflect the record below, no objection to this statement is made herein since the Petition raises only the narrow issue of the constitutionality of the Georgia Mineral Interest Statute.

## SUMMARY OF THE ARGUMENT

The Georgia Mineral Interest Statute does not violate due process because it is clearly a self-executing statute. In fact it is more self-executing than the Indiana Statute already found constitutional in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 733 (1982).

The Georgia Mineral Interest Statute does not constitute taking of property without just compensation. It has already been well established that this statute is not a taking at all, but rather a conditioning of property rights upon certain pre-requisites.

## ARGUMENT

The Petition submits two issues which Petitioner claims warrant this Court's review. However, the issues presented have already been decided adversely to Petitioner in previous decisions of this Court and no further review of the Georgia Mineral Interest Statute is warranted.

## I. THE GEORGIA STATUTE DOES NOT VIOLATE DUE PROCESS.

At the outset this Court should note that the constitutionality of this statute has already been unsuccessfully challenged in a previous case in the Georgia Supreme Court. *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983). There the Georgia Supreme Court analyzed the purpose and effect of this statute as follows:

> The Code section challenged here was also passed under the General Assembly police power. It serves dual purposes: to encourage the use of the State's mineral resources and the collection of taxes, or to encourage the use of land free of interference by holders of mineral rights who neither use nor pay taxes upon them. As such it is a reasonable exercise of the police power. By the same token, the statute itself does not divest the mineral owner of its rights; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit.

251 Ga. at 586, 308 S.E.2d at 176.

Respondents do not dispute the legal interpretation Petitioner advances for *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 733 (1982), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340 (1988). However, Petitioner's analysis of the application of those decisions to the statute in question is seriously flawed. If Petitioner is correct in that *Pope* limits the application of *Texaco* to only "self-executing statutes", there is no reason for this court to grant certiorari to consider the Georgia statute. When one compares the

Georgia statute to the Indiana statute ruled upon in *Texaco*, it is apparent that the Georgia statute is more self-executing. As pointed out by Petitioner, the Indiana statute allowed owners of multiple interest rights to receive a sixty day notice from the county and a time to cure prior to lapse. This feature is not present in the Georgia statute. There is no state action involved in the Georgia statutory scheme except the clerk's ministerial job of accepting the filing of a declaratory judgment complaint from the owner of the fee.

Like the Indiana Legislature, the Georgia Legislature found good reasons why it should condition the ownership of mineral rights in Georgia upon either the actual mining or attempted mining of the minerals or the payment of taxes upon them. If the owner of the mineral rights chooses to do nothing for a period of seven years, then the Georgia Legislature deemed it important that land titles in Georgia not continue to be burdened by obscure mineral rights. Large mining operations, such as Petitioner here, should clearly know what their obligations are under Georgia law, if they wish to preserve mineral rights. Petitioner's problem in these facts is not that it did not receive due process, but rather that it simply went about attempting to preserve its mineral rights in the wrong manner. As such, these facts clearly do not present a good test case for further due process decisions in the area of mineral rights statutes.

## II. THE GEORGIA MINERAL RIGHTS STATUTE IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The Georgia Mineral Interest Statute does not provide a statutory scheme for the taking of property. It does

not "divest the mineral owner of his right; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit." *Hayes v. Howell*, 251 Ga. at 586, 308 S.E.2d at 170. Unlike *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, (1987), here, the government is taking nothing from Petitioner. It is merely telling Petitioner that it cannot maintain mineral rights in Georgia unless it actually attempts to mine them or pays taxes on them. If it fails to do so, the rights revert back to the owner of the fee.

Even if this were viewed as a taking, it is proper exercise of police power under the espoused purposes of the act. It is hardly burdensome to require holders of mineral rights to either work these rights or pay taxes upon them. When this *de minimus* burden is compared to the considerable public policy benefit explained in *Hayes v. Howell*, there can be no question as to the constitutionality of this statutory scheme.

## CONCLUSION

For all the within and foregoing reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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OCTOBER TERM, 1990

THE GEORGIA MARBLE COMPANY,
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WALTER CECIL WHITLOCK AND COLEEN J. WHITLOCK,
*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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No. 90-683

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*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

## REPLY IN SUPPORT OF PETITION

Respondents' Brief in Opposition concedes that this case turns on whether Georgia's mineral interest forfeiture statute is the type of self-executing statute this Court upheld in *Texaco v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L.Ed. 2d 733 (1982). If it is not, this Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340 (1988) requires that Georgia's statute be struck down.

With all due respect to Respondents' position, it is simply impossible to say that Georgia's statute is in any way self-executing. Unlike Indiana's statute in *Texaco*, which caused the mineral interest to lapse much like a cause of action expires under a statute of limitations, Georgia's seven year forfeiture period literally never begins to run until the aid of the state court system is invoked. A property owner in Georgia may fail for 50 years to work or pay taxes on his property, yet if no petition for forfeiture is filed he retains all ownership rights to his property. By contrast, a property owner who merely fails to pay taxes or work his mineral interest for eight years and who suffers the misforture of having a petition for declaratory judgment filed against him loses his property once the petition is filed.

Hence, the Georgia statute is anything but self-executing. Indeed, the entire statutory forfeiture scheme is dormant until the support of the state court system is invoked. Georgia's statute cannot under any circumstances be described as self-executing, and thus, as Respondents themselves recognize, cannot survive a challenge under this Court's holding in *Tulsa Professional*.

## Summary Disposition

Petitioner respectfully submits that this case is appropriate for summary disposition pursuant to Rule 16. The question presented is purely legal and the Respondents concede that this case is controlled by whether Georgia's statute is self-executing or not. Under *Tulsa Professional*, the answer to that question is obvious and summary reversal of the Supreme Court of Georgia is therefore appropriate.

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